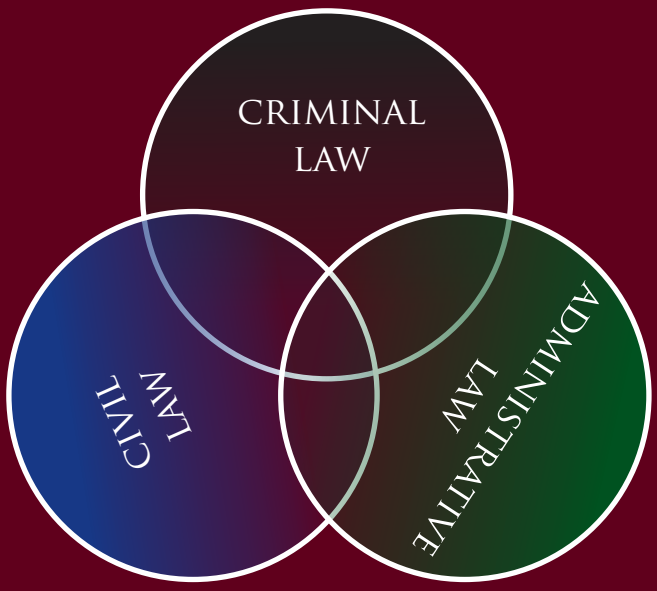
THE INTERSECTIONS OF CRIMINAL, ADMINISTRATIVE AND CIVIL LAW

INTERNATIONAL AND NATIONAL CONTEXTS



EDITED BY:
GABRIELĖ JUODKAITĖ-GRANSKIENĖ, ANDREJ GORBATKOV

The Intersections of Criminal, Administrative and Civil Law

The Intersections of Criminal, Administrative and Civil Law

International and National Contexts

Editors
Gabrielė Juodkaitė-Granskienė
Andrej Gorbatkov

KSIĘGARNIA AKADEMICKA PUBLISHING

KRAKÓW 2026

Gabrielė Juodkaitė-Granskienė
Law Faculty of Vilnius University
https://orcid.org/0000-0002-5335-1811
gabriele.juodkaite-granskiene@tf.vu.lt

Andrej Gorbatkov
Law Faculty of Vilnius University
https://orcid.org/0000-0003-1804-7272
andrejus.gorbatkovas@tf.vu.lt

© Copyright by Księgarnia Akademicka & individual authors, 2026

Review
Jonas Prapiestis
Mykhaylo Shepitko

Language editor
Lily Buchanan

Cover
Paweł Sepielak

Layout
Piotr Poniedziałek

ISBN 978-83-8368-531-1
ISBN 978-83-8368-532-8 (PDF)
https://doi.org/10.12797/9788383685328

Publication financed by the Faculty of Law at Vilnius University.

KSIĘGARNIA AKADEMICKA PUBLISHING
ul. św. Anny 6, 31-008 Kraków
tel.: 12 421-13-87; 12 431-27-43
e-mail: publishing@akademicka.pl
https://akademicka.pl

Contents

Welcome words 9
Introduction 11

Part I
The Intersection of Different Legal Responsibilities

DONATAS MURAUSKAS, CHARLES SZYPSZAK
Criminal and Administrative Liability Confounded: Regulatory Offences Under the European Convention on Human Rights and the U.S. Constitution 15

ANDŽELIKA VOSYLIŪTĖ
The Issue of Distinguishing Property Crimes from Administrative Offenses and Civil Torts in Lithuanian Judicial Practice and the Experience of Other Countries 37

RAMUNĖ ŽIEDĖ, RAMŪNAS BIRŠTONAS
Problems of the Distinction Between Different Types of Legal Liability for Misappropriation of Authorship 63

LAURA ŠIVICKAITĖ
The Relationship Between Criminal and Civil Liability of Doctors: The Example of Lithuania and Other European Countries 97

Part II
Some Legal Aspects of AI and Neuroscience Application

JUSTAS NAMAVIČIUS
Digital Attacks under International Humanitarian and Criminal Law 119

NERINGA GAUBIENĖ, KRISTINA PRANEVIČIENĖ
AI Literacy under the EU AI Act: Governance, Implementation Challenges, and the Digital Omnibus Recalibration 131

JUSTYNA LEVON, DOVILĖ VALANČIENĖ
The Intersection of Neuroscience and Criminal Law: The Analysis of Emerging Themes 149

Part III
National and International Court Jurisprudence as Sources of Applicable Standards

DONATAS MURAUSKAS
Criminal, Administrative or Civil Remedies? Positive Obligations and the Limits of State Response to Hate Speech Under the ECHR 177

GIEDRĖ LASTAUSKIENĖ
The Case Law of the Constitutional Court of the Republic of Lithuania as a Source of Authority: A Case Study 201

DACE ŠULMANE, GABRIELĖ JUODKAITĖ-GRANSKIENĖ, RODICA CIOBANU
Disciplinary Responsibility of Judges for Breaches of Ethics – Three Countries Perspective in Light of European Standards 221

GABRIELĖ JUODKAITĖ-GRANSKIENĖ, ANDREJ GORBATKOV
Forensic Expertise, Liability, and Insurance: Between Efficiency and Fairness in European and Lithuanian Legal Systems 251

REMIGIJUS MERKEVIČIUS, LIGITA GASPARĖNIENĖ, RITA REMEIKIENĖ, EVALDAS RAISTENSKIS
The Validity of the Right of the Defence Counsel (and the Suspect) to Meet Without Outsiders and to Communicate Without Interference in Lithuania, in Light of European Standards 277

Editors/Authors 337
Reviewers 341

Welcome Words

It is my pleasure to present this collective monograph, funded by the Faculty of Law at Vilnius University. The volume highlights the growing importance of examining legal issues that arise at the intersection of different branches of law and across national jurisdictions.

The contributions in this collection address a range of contemporary legal challenges shaped by technological, social, and geopolitical developments. The authors explore questions relating to legal liability, artificial intelligence, neuroscience, ethics, and the role of national and international jurisprudence in the development of legal standards.

This publication brings together the expertise of distinguished scholars, judges, legal practitioners, and other experts from Lithuania and abroad. Their analyses offer valuable insights into issues of both theoretical and practical significance and contribute to ongoing academic and professional discussions.

I am confident that this volume will be of interest to researchers, students, legal professionals, and all readers interested in contemporary legal developments from comparative and interdisciplinary perspectives.

I sincerely thank all authors, reviewers, and editors for their contribution to this publication and hope that it will inspire further research and meaningful dialogue on the challenges facing modern legal systems.

Prof. dr. Vigita Vėbraitė
Dean of the Faculty of Law
Vilnius University

Introduction

Dear Readers,

Herewith, we would like to present a collective monograph prepared at the initiative of the Faculty of Law at Vilnius University.

The idea for the book originated during the scientific-practical conference "Intersections of Criminal, Administrative, and Civil Law," held on March 28, 2025, at Vilnius University's Faculty of Law. The conference results revealed numerous pressing issues related to the regulation of similar legal relationships by different branches of law or different regulation of the same legal institute among European countries. The nature, character, purpose, and application of liability for violations of these norms in criminal, administrative, or civil law inspire scientific discussions not only at the national level, but also at the European and global levels. Therefore, based on the papers presented at the conference, it was decided to compile a collective monograph that would present the expert opinions of scholars and practicing professionals from various fields of law on specific issues of concern not only to Lithuania but also to other countries.

It is essential to note that everyday economic, social, and legal relations evolve and change in response to ongoing geopolitical, environmental, technological, cultural and other developments, which raise questions such as: What impact do these changes have on the legal system and its structure? Is a changing environment in need of detailed legal regulation, or is the existing regulation sufficient? etc. Therefore, the authors of this book attempt to analyse not only specific issues at the intersection of criminal, administrative, and civil law, but also to reveal legal problems in the sphere of insurance or ethics relevant to Lithuania and some other countries and to propose promising solutions to them.

The publication is intended for everyone interested in the comparative analysis of different countries' practices, as well as EU law, addressing different

aspects of international law, national law (criminal, administrative, disciplinary and private), international relations, and more.

A collection consisting of 12 articles written by 20 (twenty) authors. They are recognised professors and other scholars of the universities of Lithuania (Vilnius University), USA (the University of North Carolina at Chapel Hill, School of Government), judges of national courts (Constitutional Court, Supreme Court of Lithuania and Lithuanian Court of Appeal), attorneys, practicing lawyers and other experts.

The articles in the book are grouped into three chapters.

The first part of the book titled "The distinction between legal responsibilities" is devoted to examining the issue of distinguishing between types of liability, including the comparative analysis of criminal and administrative liability in EU and USA, the problems of distinguishing between criminal offences and civil law violations in the case law of the Supreme Court of Lithuania and the experience of some other countries in this area; the problems of distinguishing between different types of legal liability for copyright infringement; the problem of distinguishing between property crimes and administrative offenses and civil torts in the practice of Lithuanian courts and other Baltic countries; the relationship between the criminal and civil liability of doctors in Lithuania and other European countries and the question of the violation of judges' ethics principles based on the practices of three countries: Lithuania, Latvia and Moldova.

In the second part of the book named "Some legal aspects of AI and neuroscience applications", the authors examine the EU Artificial Intelligence (AI) Act, the risks associated with the use of AI, AI literacy requirements, digital attacks under International Humanitarian and Criminal Law, and the intersection of neuroscience and criminal law.

The third part of the book titled "National and international court jurisprudence as source of applicable standards" is dedicated to constitutional, European court jurisprudence on different legal issues, including European standards applicable in criminal procedure for the defence, insurance of forensic experts and other.

We believe that this publication will not only contribute to the advancement of science and the development of professional practice, but will also be a pleasure to read.

Sincerely,
Editors of the collection
Prof. dr. Gabriele Juodkaite-Granskiene
Assoc. prof. dr. Andrej Gorbatkov

Part I



The Intersection of Different Legal Responsibilities

The Intersections of Criminal, Administrative and Civil Law:
International and National Contexts, pp. 15–36
https://doi.org/10.12797/9788383685328.01

Donatas Murauskas
Vilnius University, Faculty of Law
donatas.murauskas@tf.vu.lt

Charles Szypszak
University of North Carolina at Chapel Hill
szypszak@sog.unc.edu

Criminal and Administrative Liability Confounded: Regulatory Offences Under the European Convention on Human Rights and the U.S. Constitution

1. Introduction

The discretion of regulatory agencies has been the subject of ongoing debate for decades. This issue is closely linked to the broader question of the extent to which regulatory agencies should be permitted to intervene in the activities of individuals and market participants. The need to act in a timely manner, unforeseen business models, and the digitalisation of social activities and markets have created a need for regulatory agencies to seek solutions that are better suited to realities. The creative approaches adopted by state authorities do not always fit neatly within the traditional civil-criminal law divide,[1] which can point to the importance of creating sufficient safeguards from uncontrolled regulatory intervention on individuals.

It took years for the major courts in Europe and the United States to develop their frameworks currently employed to address the absence of safeguards in administrative law context. This was done in specifying the criteria that

1 Gail Heriot, "An Essay on the Civil-Criminal Distinction with Special Reference to Punitive Damages," *Journal of Contemporary Legal Issues* 7, no. 1 (1996): 44.

trigger 'criminal' safeguards in the administrative law context. In the European context, the classification of an offence as 'criminal' implies significant changes in how the individual concerned is treated during both the investigation and the trial.[2] In the United States context, characterising a charge as criminal triggers fundamental protections guaranteed to defendants in the Bill of Rights. Perhaps most conspicuously, the U.S. Supreme Court (the Supreme Court) has long held that conviction for a crime requires proof 'beyond a reasonable doubt'.[3] Other constitutional rights are triggered as well, including the Seventh Amendment right to a trial by jury, and the Eighth Amendment protection against 'cruel and unusual punishments'. These protections are not afforded to someone when the courts characterise a punishment as civil rather than criminal, even when to the defendant the punishment is severe either way.

The imposition of administrative sanctions with a punitive character has led to the search for appropriate protection mechanisms. Determining the optimal threshold for triggering criminal procedural safeguards is inherently difficult. The threshold must strike a balance between, on the one hand, preserving the ability of state authorities to effectively perform functions pursued in the public interest and, on the other hand, preventing the erosion of fundamental criminal law protections where governmental measures are substantively punitive in nature. If the threshold is construed too narrowly, there is a risk that genuinely harsh state actions will evade the procedural guarantees traditionally associated with criminal proceedings.[4]

A pan-European approach to ensure certain threshold under which the criminal procedural safeguards are being invoked was established under Article 6 of the European Convention on Human Rights under the label of the *Engel* doctrine was developed in 1976.[5] The European Court of Human Rights (ECtHR

2 For example, Article 6 of the Convention on Protection of Fundamental Rights and Freedoms (the Convention) guarantees specific rights to persons charged with a criminal offence. Article 7 of the Convention applies only to such individuals. Moreover, Protocol No. 7 is also linked to the existence of criminal proceedings.

3 The U.S. Supreme Court said that this *standard provides concrete substance for the presumption of innocence-that bedrock 'axiomatic and elementary' principle whose 'enforcement lies at the foundation of the administration of our criminal law <…>. The accused, during a criminal prosecution, has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction*. See Supreme Court of the United States, In re Winship, 397 U.S. 358, 363 (1970), no. 778, March 31, 1970.

4 Issachar Rosen-Zvi and Talia Fisher, "Overcoming Procedural Boundaries," *Virginia Law Review* 94, no. 1 (2008): 122.

5 European Court of Human Rights, case of Engel and Others v. the Netherlands, applications nos. 5100/71 5101/71; 5102/71; 5354/72; 5370/72, June 8, 1976.

or the European Court) made clear that the applicability of criminal procedural guarantees does not depend exclusively on the formal classification chosen by national legal systems. A comparable analytical framework had already emerged in the United States in *Kennedy v. Mendoza-Martinez* in 1963.[6] In that case, the Supreme Court identified a number of factors relevant to determining whether a formally civil sanction should nevertheless be regarded as punitive in character.

Although the traditional civil-criminal distinction did not initially pose significant difficulties, the emergence of the administrative state and subsequent innovations in regulatory practices have complicated the assessment of procedural safeguards afforded to market participants and other individuals. European and United States regulatory agencies have not merely applied statutes. They have repeatedly invented new ways of intervening in economic and everyday life.[7] The literature shows this 'creative discretion' operating through soft law, guidance, consent orders, temporary product bans, experimental pilots, systemic-risk duties, algorithmic scoring and data-driven monitoring.[8] The core scholarly conclusion is not that agencies are simply 'activist', but that modern regulation increasingly depends on institutions that learn, improvise and fill statutory gaps under conditions of uncertainty.[9]

The aim of this paper is to investigate how Supreme Court and ECtHR delineate between criminal and non-criminal regulatory offences in the context of evolving administrative law. The paper is observational, not aimed at comprehensive analysis. First, we briefly outline the debates on civil-criminal and creative discretion in the light of evolving administrative law. Second, we examine the main criteria in both jurisdictions that seek to identify the criminal element within regulatory sanctions. Third, we analyse whether these criteria are satisfactory considering the changed nature of administrative law today.

6 Supreme Court of the United States, Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963), no. 2, February 18, 1963.

7 This shift may also be understood within the broader context of the changing mediality of law – from the traditional belief that law consists exclusively of norms issued by a sovereign legislative authority to the understanding that the mediality of law is itself shaped by regimes of knowledge and structures of power and is therefore capable of transformation. See Philip Schimchen, "Beyond Sovereignty: Decentralized Knowledge Production and Legal Normativity in the (Post-)Modern Age," *Teisė* 134 (2025): 129, https://doi.org/10.15388/Teise.2025.134.9.

8 See, for example, David Zaring, "Best Practices," *New York University Law Review* 81, no. 1 (2006): 294–351; Christopher J. Walker, "Administrative Law without Courts," *UCLA Law Review* 65 (2018): 1620–1640; Charles F. Sabel and Jonathan Zeitlin, "Learning from Difference: The New Architecture of Experimentalist Governance in the European Union," *European Law Journal* 14, no. 3 (2008): 271–327, https://doi.org/10.1111/j.1468-0386.2008.00415.x.

9 See Zaring, "Best Practices," 304–306.

The paper is primarily doctrinal. It examines the existing scholarship on two distinct, yet partially overlapping, debates: the distinction between civil and criminal liability and evolving nature of administrative law. In addition, the paper compares the approaches adopted by the Supreme Court and the European Court of Human Rights in delineating criminal offences from civil violations, identifying structural similarities in their reasoning. The comparative analysis enables us to highlight a potential conceptual impasse shared by both jurisdictions and to argue for the need to develop a distinct, administrative law-based framework for addressing regulatory offences.

2. The Debates on Civil-Criminal Division and Evolving Nature of Administrative Law

2.1. The Civil-Criminal Debate – Absence of Clarity in Established Delineation Criteria

The civil-criminal debates in both European and United States scholarship focus on the lack of rigidity in the application of established criteria used to distinguish criminal offences from other regulatory and civil breaches. This has prompted discussion as to whether these criteria are satisfactory, including questions about how their meaning has been refined in subsequent case law of leading courts.

The most acute recent critic of the threshold doctrine itself is Robert Goss, whose 2025 article is the clearest recent attack on the internal coherence of the *Engel* framework[10] and whose 2023 article on the 'disappearing' minimum rights of Article 6 of the Convention highlights a parallel concern: even where proceedings remain formally criminal, substantive defense guarantees may be thinning.[11] Robert Attard's 2026 paper *Escaping the Engel Criteria*,[12] studies the 'Engel judgements' as a body and argues that the ECtHR sometimes escapes

10 Ryan Goss, "The Engel Criteria in the 21st Century: Irrational Flexibility and Deference in Recent European Court of Human Rights Jurisprudence," *Human Rights Law Review* 25, no. 4 (2025): ngaf031, https://doi.org/10.1093/hrlr/ngaf031.

11 Ryan Goss, "The Disappearing 'Minimum Rights' of Article 6 ECHR: The Unfortunate Legacy of *Ibrahim* and *Beuze*," *Human Rights Law Review* 23, no. 4 (2023): ngad024, https://doi.org/10.1093/hrlr/ngad024.

12 Robert Attard, "Escaping the Engel Criteria," *Malta Journal of Legal Studies* 1, no. 1-2 (2026): 44–91, https://doi.org/10.1163/30508762-00000001.

the orthodox framework for reasons of expediency and efficiency, making the criteria more and more 'blurry'.

Javier Ignacio Escobar Veas addresses one of the fundamental issues of multiple sanctioning systems in Europe that is grounded on the interaction between European Union, Council of Europe and national legal systems.[13] He addresses this issues in the light of *Ne bis in idem* principle, but the discussion is nevertheless part of the broader debate of how to reconcile multiple sanctioning systems in Europe with the principles of fundamental rights, especially related to basic safeguards of criminal law.

Legal scholars in the United States largely have criticised the Supreme Court's analytical approach to the question of when an administrative penalty implicates the constitutional protections afforded criminal proceedings. As one commentator summarised, *scholars and jurists have criticised* Mendoza-Martinez *on a number of grounds*, including a framework that is too deferential to the legislature in ways that deprive citizens of advance notice of violations, with a framework that is *highly subjective and potentially leads to results that undermine public confidence in the rule of law*.[14] This commentary also noted, *Because of these problems, some critics have proposed jettisoning the* Mendoza-Martinez *framework altogether*.[15]

Some Supreme Court justices also have called into question the utility of the *Mendoza-Martinez* multi-factor framework. In the 2005 case of *Smith v. Doe*,[16] a majority of the justices applied the factors to a challenge brought by an individual who was convicted of sex offenses and required by state law to register with the state and local law enforcement. The majority held that these requirements were not punishments that triggered constitutional protection against retroactively applied criminal laws, using elements from *Mendoza-Martinez* but also noting that these factors are *neither exhaustive nor dispositive*.[17] Although seven of the nine justices agreed with the outcome, two of those seven filed concurring opinions with different analyses. Dissenting Justice John Paul

13 Veas Escobar and Javier Ignacio, *Ne bis in idem and Multiple Sanctioning Systems: A Case Law Study of the European Court of Human Rights and the Court of Justice of the EU*, Springer, 2023. See also other important contributions such as Xavier Groussot and Angelica Ericsson, "Ne Bis in Idem in the EU and ECHR Legal Orders: A Matter of Uniform Interpretation?" In *Ne Bis in Idem in EU Law*, ed. Bas van Bockel (Cambridge University Press, 2016), 53–102, https://doi.org/10.1017/9781316091845.003.

14 David A. Singleton, "What Is Punishment?: The Case for Considering Public Opinion Under Mendoza-Martinez," *Seton Hall Law Review* 45, no. 2 (2015): 435–474, https://scholarship.shu.edu/cgi/viewcontent.cgi?article=1533&context=shlr.

15 Singleton, "What Is Punishment?" 443.

16 Supreme Court of the United States, Smith v. Doe, 538 U.S. 84 (2003), no. 01-729, March 5, 2003.

17 Smith v. Doe, para 97.

Stevens criticised what he saw as the Court's tendency to *manipulate multifactor tests*.[18] In a recent case challenging a victim restitution requirement Justice Clarence Thomas noted the problematic nature of deferring to the legislature's choice of language in a statute. He said, *The modern framework, because of how much it turns on legislative labelling and semantics, allows a legislature to manipulate when the protection will apply*.[19]

2.2. The Debates on the Nature of Administrative Law – Emerging Regulatory Creativity

The changing nature of administrative law is reflected in scholarship debates on the role of regulatory agencies in shaping legal frameworks of regulated subjects. *Long gone are the day when one might comfortably profess to be an advocate of either 'compliance' or 'deterrence' approaches*, R. Baldwin and others note.[20] The regulatory creativity occurs when agencies develop intervention tools that are not exhaustively specified by legislation but are assembled from broad purposes, technical mandates, procedural flexibility, and institutional learning. David Zaring's account of agencies regulating by 'best practices',[21] C.J. Walker's view on modern administrative law operating without courts,[22] and Nicholas Parrillo's work on guidance[23] all show how agencies can govern behaviour outside classic rulemaking and adjudication.

European scholarship describes a parallel but institutionally distinct phenomenon. Sabel and Zeitlin's work on experimentalist governance frames regulation as recursive goal-setting, monitoring, reporting, and revision under uncertainty.[24] More recent work on European Union agencies shows how discretion has expanded through delegation doctrines, soft law and networked administration. Simoncini argues that the post-crisis case law on the European Securities and Markets Authority (ESMA) altered the law governing delegation of

18 Smith v. Doe, para 110, 113 (Stevens, J., dissenting).

19 Supreme Court of the United States, Ellingburg v. United States, 607 U.S. 163, 169, 177–178 (2026), no. 24-482, January 20, 2026 (Thomas, J., concurring).

20 Robert Baldwin, Martin Cave and Martin Lodge, *Understanding Regulation: Theory, Strategy, and Practice*, 2nd ed. (Oxford University Press, 2012), 9.

21 Zaring, "Best Practices."

22 Walker, "Administrative Law without Courts."

23 Nicholas R. Parrillo, "Should the Public Get to Participate Before Federal Agencies Issue Guidance? An Empirical Study," *Administrative Law Review* 71, no. 1 (2019): 57–125.

24 Sabel and Zeitlin, "Learning from Difference."

powers to European Union agencies.[25] Iglesias-Rodríguez characterises ESMA product intervention as a form of *residual lawmaking*, shifting European Union financial regulation from warnings and convergence toward direct prohibition and restriction.[26] Foster and Ringe, in turn, building on the Supreme Court Justice Louis Brandeis' ideal of *regulated competition* argue that the European Union administrative system's significant bureaucratic discretion has enabled social learning and *regulated competition* in ways the United States has not matched institutionally.[27]

3. The Delineation Criteria

3.1. The European Standard – *Engel* Criteria and Later Developments

The drafting of the European Convention did not anticipate the importance and scope of regulatory sanctions in the second half of the twentieth century.[28] Andrijauskaitė notes: *the percolation of administrative sanctions into the case law of the ECtHR happened against the backdrop of the growth of the 'administrative state', which took on more and more novel functions and the increasing use of administrative sanctions as a handy tool to achieve the goals of public administration in post-war Europe*.[29] The Committee of Ministers' reaction to growing discretionary powers of regulatory agencies is clear from Resolution (77) 31 on

25 Marta Simoncini. "The Delegation of Powers to EU Agencies after the Financial Crisis," *European Papers* 6, no. 3 (2021): 1485–1503.

26 Pablo Iglesias-Rodríguez, "ESMA as a Residual Lawmaker: The Political Economy and Constitutionality of ESMA's Product Intervention Measures on Complex Financial Products," *European Business Organization Law Review* 22 (2021): 627–671, https://doi.org/10.1007/s40804-021-00218-y.

27 Chase Foster and Kathleen Thelen, "Brandeis in Brussels? Bureaucratic Discretion, Social Learning, and the Development of Regulated Competition in the European Union," *Regulation & Governance* 18, no. 4 (2024): 1083–1103, https://doi.org/10.1111/rego.12570.

28 This paper does not address the standards developed by the EU courts, nor does it examine the significance of EU law for the development of national regulatory frameworks in Council of Europe member states that are also members of the European Union. The interaction between EU law and the Convention system is both complex and continuously evolving (see, for example, Egidijus Kūris, "Brussels in Strasbourg: Theoretical Reflections on the Impact of European Union Law on the Case-Law of the European Court of Human Rights." *Teisė* 131 (2024): 8–22, https://doi.org/10.15388/Teise.2024.131.1. The authors acknowledge that incorporating the EU dimension could strengthen the argument advanced in this paper. However, they consider that doing so would substantially broaden and complicate the scope of the analysis.

29 Agne Andrijauskaitė, "The Principles of Administrative Punishment under the ECHR" (PhD diss., Vilnius University, 2022), 139.

the protection of the individual in relation to the acts of administrative authorities, which was adopted in 1977.

The European Convention is silent on regulatory or administrative offences and the sanctions associated with them. Based on the text of the Convention, the human rights implications relating to investigative and trial standards depend on whether an 'offence' is classified within the criminal or civil legal framework.

However, the Strasbourg Court soon recognised the difficulties arising from the increasing sophistication of regulatory agencies in designing sanctioning regimes that formally remained outside the domain of criminal law, while nonetheless pursuing punitive and deterrent objectives. In response, the Court gradually developed an autonomous interpretation of the notion of a 'criminal charge' in order to prevent states from circumventing Convention guarantees through purely formal classifications.

In the landmark judgment *Engel and Others v. the Netherlands*,[30] the Plenary of the ECtHR examined whether disciplinary sanctions imposed on Dutch soldiers, including detention, could be regarded as 'criminal' within the meaning of Article 6 of the Convention. The European Court emphasised that a sanction may still fall within the autonomous concept of 'criminal' under the Convention even where domestic law formally classifies it as administrative or disciplinary, provided that the relevant criteria support such a conclusion:

> *If the Contracting States were able at their discretion to classify an offence as disciplinary instead of criminal, or to prosecute the author of a 'mixed' offence on the disciplinary rather than on the criminal plane, the operation of the fundamental clauses of Articles 6 and 7 <...> would be subordinated to their sovereign will. A latitude extending thus far might lead to results incompatible with the purpose and object of the Convention. The Court therefore has jurisdiction, under Article 6 <...> and even without reference to Articles 17 and 18 <...>, to satisfy itself that the disciplinary does not improperly encroach upon the criminal*.[31]

The *Engel* case created a fundamental three criteria-based test on whether the circumstances fall under criminal aspect of Article 6 of the Convention:

1. classification in domestic law;
2. nature of the offence;
3. severity of the penalty that the person concerned risks incurring.

30 Engel and Others v. the Netherlands.

31 Engel and Others v. the Netherlands, para 81.

These criteria, however, appear to provide only broad and somewhat abstract guidance, particularly for national authorities seeking to apply them in practice. Several important questions arise. First, is there any hierarchy or priority among the three criteria? Second, what is the precise substantive content of each criterion, especially the second and third, which are more open-ended and susceptible to interpretation? The uncertainty surrounding these issues has required the European Court to further clarify the scope and application of the Engel criteria through its subsequent case law.

The ECtHR addressed the issue of priorities. The first criterion is considered *relative weight and serves only as a starting-point.*[32] The fact that the first criterion does not have a decisive influence, even in cases when the charge is criminal under the national law makes further analysis complicated. R. Goss in his analysis clearly shows how even the first criterion in *Gestur Jónsson and Ragnar Halldór Hall v Iceland*[33] may be dependent on the genuine ECtHR analysis, disregarding the initial classification made by national authorities.[34]

In the Grand Chamber judgment *Jussila v. Finland*,[35] which is so far the second most important judgement of the ECtHR related to the development of *Engel* criteria (after *Engel* itself), the European Court tried to clarify Engel criteria. The ECtHR established that the second criterion, i.e. the nature of the offence, is the more important.[36] *Jussila* and other judgements helped the European Court to establish sub-criteria of the second Engel criterion:[37]

1. the target group of the rule (general or specific);
2. the body that initiates the proceedings;
3. the nature of the rule (punitive or deterrent);
4. if the rule protects what is usually protected by criminal law;
5. presence of the need to prove guilt;
6. comparison to other legal systems of the Council of Europe.

---

32 European Court of Human Rights, case of Weber v. Switzerland, application no. 11034/84, May 22, 1990, para 31.

33 European Court of Human Rights, case of Gestur Jónsson and Ragnar Halldór Hall v. Iceland, applications nos. 68273/14 and 68271/14, December 22, 2020.

34 Goss, "The Engel Criteria in the 21st Century," 8.

35 European Court of Human Rights, case of Jussila v. Finland, application no. 73053/01, November 23, 2006.

36 Jussila v. Finland, para 38.

37 Summarised in: European Court of Human Rights, Guide on Article 6 of the European Convention on Human Rights: Right to a fair trial (criminal limb), February 28, 2026, para 26.

The third *Engel* criterion – severity of the penalty – is also complicated, considering the variety of how the ECtHR approaches the question. The good example here is *Sancaklı v. Turkey*,[38] where the European Court acknowledged that *although the administrative fine was not a substantial amount, it was punitive*.[39] The applicant was 'sentenced' with an administrative fine of 62 Euros.

This demonstrates that the financial magnitude of a sanction is not, in itself, determinative of whether proceedings fall within the criminal sphere of Article 6. Rather, the ECtHR also considers the underlying purpose and character of the sanction, especially whether it serves punitive or deterrent aims. *Jussila* judgment introduced a further dimension to the notion of 'criminal charges' by distinguishing 'core crimes' from other categories of criminal offences, with particular emphasis on the criterion of stigma:

> *Notwithstanding the consideration that a certain gravity attaches to criminal proceedings, which are concerned with the allocation of criminal responsibility and the imposition of a punitive and deterrent sanction, it is self-evident that there are criminal cases which do not carry any significant degree of stigma. There are clearly 'criminal charges' of differing weight. <...> [T]he autonomous interpretation adopted by the Convention institutions of the notion of a 'criminal charge' by applying the Engel criteria have underpinned a gradual broadening of the criminal head to cases not strictly belonging to the traditional categories of the criminal law <...>.*[40]

The existence of stigma *per se* can by no means provide a watertight distinction between criminal and administrative liability.[41] The differentiation between types of crimes made in *Jussila* judgment concerned not only the scholars,[42] but also the judges of the ECtHR. Judge Loucaides in his dissenting opinion[43] asks challenging questions:

---

38 European Court of Human Rights, case of Sancakli v. Turkey, application no. 1385/07, May 15, 2018.

39 Sancakli v. Turkey, para 30.

40 Jussila v. Finland, para 43.

41 Andrijauskaitė, "The Principles of Administrative Punishment under the ECHR," 171.

42 E.g. Adrienne de. Moor-van Vugt, "Administrative Sanctions in EU Law," *Review of European Administrative Law* 5, no. 1 (2012): 5–41. https://pure.uva.nl/ws/files/1331686/108283_REAlaw_2012_1_Administrative_sanctions_in_EU_law.pdf; Anne Weyembergh and Nicolas Joncheray, "Punitive Administrative Sanctions and Procedural Safeguards: A Blurred Picture That Needs to Be Addressed," *New Journal of European Criminal Law* 7, no. 2 (2016): 190–209, https://doi.org/10.1177/203228441600700208.

43 Jussila v. Finland, partly dissenting opinion of Judge Loucaides joined by Judges Zupančič and Spielmann.

I find it difficult, in the context of a fair trial, to distinguish, as the majority do in this case, between criminal offences belonging to the 'hard core of criminal law' and others which fall outside that category. Where does one draw the line? In which category does one place those offences which on their face value do not appear severe, but if committed by a recidivist may lead to serious sanctions? I believe that the guarantees for a fair trial envisaged by Article 6 of the Convention apply to all criminal offences.

The flexibility with which the European Court's approaches finding of a criminal aspect in the circumstances of the case seems to accommodate twofold aim. First, the possibility of the ECtHR remaining flexible in own's choices, which is depicted by Ryan Goss as 'irrational flexibility'.[44] This direction may be grounded on the idea of an 'autonomous concept' of a criminal charge developed by the Court and being referred to in its case-law. The second aim might be the willingness to give an opportunity to the national governments to address the public interest-based justification of the intervention,[45] which may be grounded on the subsidiarity principle embedded in the Convention.

3.2. The American Standard – *Mendoza-Martinez* Test

The legal boundary of limits on agency enforcement authority over individuals and organisations receives far less attention in the United States than most other aspects of governmental powers. This is despite U.S. Supreme Court Justice Henry Jackson's observation in 1952 that by then, more than 70 years ago, agencies had already become a 'veritable fourth branch of the Government' with more influence over personal rights than the three branches in the constitutional framework.[46]

Agencies' authority sometimes includes the power to impose severe penalties on those who are subject to their regulations, without affording the accused the constitutional protections that attend criminal prosecution, such as presumptions of innocence and the requirement of proof beyond a reasonable doubt, a prohibition on double jeopardy, and the right to a trial by jury. American law does not draw a line at the severity of a penalty beyond which an agency may

44 Goss, "The Engel Criteria in the 21st Century," 3.

45 Goss, "The Engel Criteria in the 21st Century," 18.

46 Supreme Court of the United States, F.T.C. v. Ruberoid Co., 343 U.S. 470 (1952), no. 448, May 26, 1952 (Jackson, J., dissenting).

not go without extending criminal law rights. Penalties can be quite severe. For example, in just one year, the Occupational Health and Safety Administration of the federal Department of Labor imposed 139 fines of $40,000 or above in one state, New Jersey, with some fines higher than $1 million. The federal Environmental Protection Agency is well known for having the power to shut down a business. In 2009, a petroleum company was fined more than $81 million for not having pollution controls that the agency deemed necessary. The company also agreed to spend more than $161 million on pollution controls and to pay a $12 million civil penalty in prosecution of violations of federal air control laws.

The U.S. Supreme Court has extended great deference to the Congress to authorise such severe penalties for administrative violations. The Court also has largely deferred to agencies to impose severe penalties without criminal law protections unless Congress has expressly invoked the criminal law. The Court's approach is stated in general terms. As the Court said, even in those cases where Congress *has indicated an intention to establish a civil penalty, we have inquired further whether the statutory scheme was so punitive either in purpose or effect*,[47] as to *transfor[m] what was clearly intended as a civil remedy into a criminal penalty*.[48] The Court's further guidance is sometimes called the '*Mendoza-Martinez* test', named after a 1963 case in which the Court considered the constitutionality of punitive measures imposed by immigration authorities. The factors to be considered, according to this test, include:

1. whether the sanction involves an affirmative disability or restraint;
2. whether it has historically been regarded as a punishment;
3. whether it comes into play only on a finding of scienter;
4. whether its operation will promote the traditional aims of punishment-retribution and deterrence;
5. whether the behaviour to which it applies is already a crime;
6. whether an alternative purpose to which it may rationally be connected is assignable for it;
7. and whether it appears excessive in relation to the alternative purpose assigned.[49]

---

47 Supreme Court of the United States. United States v. Ward, 448 U.S. 242, 248, 249 (1980), no. 79-394, June 27, 1980.

48 Supreme Court of the United States. Rex Trailer Co. v. United States, 350 U. S. 148, 154 (1956), no. 46, January 9, 1956.

49 Supreme Court of the United States. Kennedy v. Mendoza-Martinez, 372 U. S. 144, 168, 169 (1963), no. 2, February 18, 1963.

Unsurprisingly, no clear measures emerge from this long list of factors, and agencies largely have been left to their own discretion.

Despite ongoing criticism of both the imprecision of the multi-factor framework and the absence of clear boundaries on agency powers, there remains no clear boundary at which an agency authority to impose penalties triggers the constitutional rights afforded to any defendant in a matter the legislature has defined as criminal. Whether this continues to escape clearer definition is an interesting question in view of the Court's recent cases expressing concern about the powers that agencies have assumed. For instance, in the recent *Loper Bright* case, in which the Court overturned the *Chevron* doctrine that required court deference to agency interpretations of ambiguous statutes, Chief Justice John Roberts, writing for the majority, noted that origins of grants of administrative power included measures *as a check upon administrators whose zeal might otherwise have carried them to excesses not contemplated in legislation creating their offices*.[50]

4. Comparative Insights – Absence of Coherence does not Prevent Regulatory Creativity

Both the Supreme Court and ECtHR doctrines aim to safeguard individuals from intrusive regulatory sanctions by applying standards typically reserved for criminal liability. However, the continued evolution of administrative law has produced new types of regulatory activities that, on the one hand, escape the vague criteria set by the European Court and the Supreme Court, but on the other hand, significantly interfere with individual rights.

It is not a simple task to compare the jurisprudence of the Supreme Court and the ECtHR regarding the delineation of regulatory offences as criminal or non-criminal. There are substantial limitations to conducting comprehensive analysis. These include differences in jurisdiction: in administrative law, the Supreme Court deals primarily with federal regulatory agencies, whereas the ECtHR examines the practices of national administrative authorities. In addition, the U.S. Constitution and the Convention employ different legal frameworks and terminology for determining whether circumstances fall within the scope of criminal law protection.

---

50 Supreme Court of the United States. Loper Bright Enterprises v. Raimondo, 603 U.S. 369 (2024), no. 22-451, June 28, 2024 (quoting Supreme Court of the United States. United States v. Morton Salt Co., 338 U. S. 632, 644 (1950), February 6, 1950.).

Moreover, both courts operate within distinct constitutional, regulatory, procedural, and cultural contexts. For these reasons, our paper does not aim to provide an exhaustive comparison. Rather, we seek to identify general similarities between potentially comparable criteria and to examine whether similar patterns can be observed in the development of a discretionary, regulatory-agency--based approach to regulatory offences.

We exclude the first criterion of the European Court as it is not comparable to any criteria in the United States legal framework. With the *Mendoza-Martinez* test the U.S. Supreme Court is considering the application of the U.S. Constitution to agencies empowered by federal law, which does not implicate state-level or other law comparable to European consideration of domestic law.

After comparing substantive criteria of European and United States tests, we found that the majority of criteria are similar:

Table 1. The delineation of civil-criminal offences in Europe and the United States

	European	United States	Comments
The aim of the applicable rule	whether the legal rule has a punitive or deterrent purpose[51]	whether its operation will promote the traditional aims of punishment-retribution and deterrence	very similar
The scope of sanction	the degree of severity of the penalty that the person concerned risks incurring[52]	whether the sanction involves an affirmative disability or restraint	more specific in the U.S. case law
External outlook: comparative and historical	how comparable procedures are classified in other Council of Europe member States[53]	whether it has historically been regarded as a punishment	U.S. – historical perspective, European – national contexts; both are external, contextual, unrelated to the rule being examined

51 European Court of Human Rights, case of Öztürk v. Turkey, application no. 8544/79, February 21, 1984, para 53.

52 Engel and Others v. the Netherlands, para 82.

53 Öztürk v. Turkey, para 53.

	European	United States	Comments
The need to analyse the subjective side of a conduct	whether the imposition of any penalty is dependent upon a finding of guilt[54]	whether it comes into play only on a finding of scienter	both reflect the essential nature of state of mind in the criminal law
The purpose of the rule – typically criminal or other?	whether the legal rule seeks to protect the general interests of society usually protected by criminal law[55] and whether the legal rule seeks to protect the general interests of society usually protected by criminal law[56]	whether an alternative purpose to which it may rationally be connected is assignable for it and whether it appears excessive in relation to the alternative purpose assigned	similarly emphasising the logic of looking at substance over form

Created by authors.

One of the factors in the *Mendoza-Martinez* test does not appear in the European analogue: *whether the behaviour to which it applies is already a crime*. This follows from the logic that when a statute has already defined an act as a crime, calling the penalty civil does not change the nature of the prohibition from how the legislature already characterised it.[57] On the other hand, the United States test does not include such European criterion as *whether the proceedings are instituted by a public body with statutory powers of enforcement*.[58] This criterion supports the general purpose of the sanction-related criterion, as it indicates that the sanction is genuinely punitive in nature, imposed by an authority whose functions include the administration of such sanctions.

54 European Court of Human Rights, case of Benham v. United Kingdom, application no. 19380/92, June 10, 1996, para 56.

55 European Court of Human Rights, Menarini Diagnostics S.r.l. v. Italy, application no. 43509/08, September 27, 2011, para 40.

56 Established in Menarini Diagnostics S.r.l. v. Italy, para 40 and European Court of Human Rights, case of Produkcija Plus storitveno podjetje d.o.o. v. Slovenia, application no. 47072/15, October 23, 2018, para 42.

57 Supreme Court of the United States. Lipke v. Lederer, 259 U.S. 557, 562 (1922), no. 596, June 5, 1922.

58 Benham v. United Kingdom, para 56.

We found that both courts are similar on the content and the level of abstractness of criteria of delineation and the developing case-law does not help to achieve more precision. The resulting lack of clarity of criteria can be attributed in large part to two fundamental values that do not seem to mesh in this context. One is the strong tradition of judicially recognised safeguards against the state's use of its powers to deprive individuals of their liberty and property. The beyond-a-reasonable-doubt proof requirement in the United States, for example, is a judicially created rule that has been zealously applied. At the same time, the courts have seen the steady rise of administrative states, and they have largely deferred to the elected bodies for determining the extent of delegation of their powers and the tools that the agencies can wield in enforcing their regulations.

Still, the factors identified by both the ECtHR and the Supreme Court are for the most part similar in both description and aim. To the extent they focus on substance over form, and how the subject offence and penalty compare to what has traditionally been deemed criminal and warranting enhanced defendant protections, they give at least reasonable guidance that can result in a coherent approach if consistently applied. On the other hand, giving much weight to whether the legislature chooses to define these elements as administrative penalties or criminal punishment threatens to undermine the distinction. At some point, even a purely monetary fine regime can deprive individuals not only of their property rights but also their livelihoods and prospects.

The courts may find the need to place greater emphasis on the severity of the consequences to determine whether fundamental criminal rights should be applied. The courts have done this in defining those rights in criminal law. In the United States, for example, the Supreme Court has held that the Sixth Amendment right *to have the assistance of counsel for his defense* does not apply to every criminal prosecution, but it does apply to felony cases, state juvenile criminal cases, and state misdemeanour prosecutions that risk incarceration.

The European Court adopted a slightly different approach. In the *Jussila* judgment, it began to develop a distinction between 'core crimes' and other categories of criminal offences, placing particular emphasis on the criterion of stigma. This may represent a step toward a clearer differentiation between activities that should fall under the strict scrutiny of criminal procedural safeguards and administrative measures that may require greater innovation and flexibility.

The creative role of regulatory agencies is a feature that sits uneasily with the traditional foundations of criminal law, particularly the principles of certainty and foreseeability. A person's reasonable expectations about whether an act is prohibited and punishable rests at the heart of constitutional protections in the

criminal law. Yet modern regulatory agencies may deem themselves increasingly compelled to operate in this creative mode if they are to preserve their effectiveness and adapt to what they see as ongoing social and technological change. The problem arises when such creativity directly encroaches upon individual rights.

Regulatory agencies gain considerable creative latitude from open-textured statutory standards. They also rely heavily on soft law and quasi-law instruments, including guidance, opinions, notices, policy statements, technical standards, best-practice documents, and non-binding yet compliance-shaping recommendations.[59] In addition, agencies expand their discretion through experimental and adaptive forms of governance.

Current modern regulation in both Europe and the United States increasingly depends on agencies' ability to discover and assemble new interventions under uncertainty. The central legal question is how legal frameworks can make that creativity effective without letting it become unbounded. Current regulatory creativity has exhausted the potential of the traditional civil–criminal law bifurcation, thereby requiring a conceptually different approach within the context of administrative law, one that reflects the realities of modern administrative governance and the need for flexibility and innovation on the part of state authorities.

5. Conclusions

Federal agencies in the United States, and national agencies in Europe, have evolved into powerful bodies that regulate individuals in virtually all aspects of their personal and commercial activities. With those powers, agencies have become instruments for subjecting individuals to punishments that can have an effect much like the severe consequences that courts have identified as warranting protective rights for criminal law defendants. The European Court of Human Rights, and the U.S. Supreme Court, have only rarely taken up the important question of whether criminal defendant rights should be triggered based on the nature of the punishment regardless of whether the enabling law identified the regulated matter as 'administrative' or 'criminal'. When they have done so, these courts have identified similar, but not identical factors to consider. Some judges and commentators have fairly described these skeletal case law frameworks as imprecise and malleable.

[59] See Parrillo, "Should the Public Get to Participate Before Federal Agencies Issue Guidance?"; Walker, "Administrative Law without Courts"; Zaring, "Best Practices" and others.

What might be more concerning than the open-ended nature of the courts' approaches to a boundary between criminal and administrative punishment is the seeming lack of attention paid to the question. In the criminal law context, fundamental questions such as consistency of sentences, a privilege against self-incrimination, a right to legal representation, and the necessary neutrality of a presiding judge have been subjects of ongoing, extensive attention from jurists and scholars. Meanwhile, a fog persists in the law about the point at which a punishment crosses from administrative law into the realm at which these privileges and rights, at least in some form, should apply. These rights and privileges are vulnerable to fundamental diminution without clarity about the limits on administrative punishment authority, including a clearer focus on their application regardless of whether the punishment is imposed in a procedure labelled as administrative or criminal.

Administrative law has reached a stage at which it should develop its own procedural safeguards, rather than having them determined through the traditional civil-criminal distinction, even though administrative law still lacks a formal constitute ground that would enable the independent development of procedural guarantees in cases of regulatory enforcement.

References

Andrijauskaitė, Agnė. "The Principles of Administrative Punishment under the ECHR." PhD diss., Vilnius University, 2022. https://doi.org/10.15388/vu.thesis.408.

Attard, Robert. "Escaping the Engel Criteria." *Malta Journal of Legal Studies* 1, no.1-2 (2026): 44–91. https://doi.org/10.1163/30508762-00000001.

Baldwin, Robert, Martin Cave, and Martin Lodge. *Understanding Regulation: Theory, Strategy, and Practice*. 2nd ed. Oxford University Press, 2012. https://doi.org/10.1093/acprof:osobl/9780199576081.001.0001.

Committee of Ministers of the Council of Europe. Resolution on the Protection of the Individual in Relation to the Acts of Administrative Authorities. No. (77) 31. September 28, 1977.

Escobar Veas, Javier Ignacio. *Ne bis in idem and Multiple Sanctioning Systems: A Case Law Study of the European Court of Human Rights and the Court of Justice of the EU*. Springer, 2023.

European Court of Human Rights. Guide on Article 6 of the European Convention on Human Rights: Right to a fair trial (criminal limb). February 28, 2026.

Foster, Chase, and Kathleen Thelen. "Brandeis in Brussels? Bureaucratic Discretion, Social Learning, and the Development of Regulated Competition in the European

Union." Regulation & Governance 18, no. 4 (2024): 1083–1103. https://doi.org/10.1111/rego.12570.

Goss, Ryan. "The Disappearing 'Minimum Rights' of Article 6 ECHR: The Unfortunate Legacy of *Ibrahim* and *Beuze*." *Human Rights Law Review* 23, no. 4 (2023): ngad024. https://doi.org/10.1093/hrlr/ngad024.

Goss, Ryan. "The Engel Criteria in the 21st Century: Irrational Flexibility and Deference in Recent European Court of Human Rights Jurisprudence." *Human Rights Law Review* 25, no. 4 (2025): ngaf031. https://doi.org/10.1093/hrlr/ngaf031.

Groussot, Xavier, and Angelica Ericsson. "Ne Bis in Idem in the EU and ECHR Legal Orders: A Matter of Uniform Interpretation?" In *Ne Bis in Idem in EU Law*, edited by Bas van Bockel. Cambridge University Press, 2016. https://doi.org/10.1017/9781316091845.003.

Heriot, Gail L. "An Essay on the Civil-Criminal Distinction with Special Reference to Punitive Damages." *Journal of Contemporary Legal Issues* 7, no. 1 (1996): 43–44.

Iglesias-Rodríguez, Pablo. "ESMA as a Residual Lawmaker: The Political Economy and Constitutionality of ESMA's Product Intervention Measures on Complex Financial Products." *European Business Organization Law Review* 22 (2021): 627–671. https://doi.org/10.1007/s40804-021-00218-y.

Kūris, Egidijus. "Brussels in Strasbourg: Theoretical Reflections on the Impact of European Union Law on the Case-Law of the European Court of Human Rights." *Teisė* 131 (2024): 8–22. https://doi.org/10.15388/Teise.2024.131.1.

de Moor-van Vugt, Adrienne. "Administrative Sanctions in EU Law." *Review of European Administrative Law* 5, no. 1 (2012): 5–41. https://pure.uva.nl/ws/files/1331686/108283_REAlaw_2012_1_Administrative_sanctions_in_EU_law.pdf

Parrillo, Nicholas R. "Should the Public Get to Participate Before Federal Agencies Issue Guidance? An Empirical Study." *Administrative Law Review* 71, no. 1 (2019): 57–125.

Rosen-Zvi, Issachar, and Talia Fisher. "Overcoming Procedural Boundaries." *Virginia Law Review* 94, no. 1 (2008): 79–155.

Sabel, Charles F., and Jonathan Zeitlin. "Learning from Difference: The New Architecture of Experimentalist Governance in the European Union." *European Law Journal* 14, no. 3 (2008): 271–327. https://doi.org/10.1111/j.1468-0386.2008.00415.x.

Schimchen, Philip. "Beyond Sovereignty: Decentralized Knowledge Production and Legal Normativity in the (Post-)Modern Age." *Teisė* 134 (2025): 123–130. https://doi.org/10.15388/Teise.2025.134.9.

Simoncini, Marta. "The Delegation of Powers to EU Agencies after the Financial Crisis." *European Papers* 6, no. 3 (2021): 1485–1503.

Singleton, David A. "What Is Punishment?: The Case for Considering Public Opinion Under Mendoza-Martinez." *Seton Hall Law Review* 45, no. 2 (2015): 435–474. https://scholarship.shu.edu/cgi/viewcontent.cgi?article=1533&context=shlr.

Walker, Christopher J. "Administrative Law without Courts." *UCLA Law Review* 65 (2018): 1620–1640.

Weyembergh, Anne, and Nicolas Joncheray. "Punitive Administrative Sanctions and Procedural Safeguards: A Blurred Picture That Needs to Be Addressed." *New Journal of European Criminal Law* 7, no. 2 (2016): 190–209. https://doi.org/10.1177/203228441600700208.

Zaring, David. "Best Practices." *New York University Law Review* 81, no. 1 (2006): 294–350.

Court practices

European Court of Human Rights. Case of Benham v. The United Kingdom. Application no. 19380/92. June 10, 1996.

European Court of Human Rights. Case of Engel and Others v. the Netherlands. Applications nos. 5100/71; 5101/71; 5102/71; 5354/72; 5370/72. June 8, 1976.

European Court of Human Rights. Case of Gestur Jónsson and Ragnar Halldór Hall v. Iceland. Applications nos. 68273/14 and 68271/14. December 22, 2020.

European Court of Human Rights. Case of Jussila v. Finland. Application no. 73053/01. November 23, 2006.

European Court of Human Rights. Case of Produkcija Plus storitveno podjetje d.o.o. v. Slovenia. Application no. 47072/15. October 23, 2018.

European Court of Human Rights. Case of Öztürk v. Germany. Application no. 8544/79. February 21, 1984.

European Court of Human Rights. Case of Sancakli v. Turkey. Application no. 1385/07. May 15, 2018.

European Court of Human Rights. Case of Weber v. Switzerland. Application no. 11034/84. May 22, 1990.

European Court of Human Rights. Menarini Diagnostics S.r.l. v. Italy. No. 43509/08. September 27, 2011.

Supreme Court of the United States. Ellingburg v. United States, 607 U.S. 163, 169, 177-178 (2026). No. 24-482. January 20, 2026.

Supreme Court of the United States. F.T.C. v. Ruberoid Co., 343 U.S. 470 (1952). No. 448. May 26, 1952.

Supreme Court of the United States. Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168, 169 (1963). No. 2. February 18, 1963.

Supreme Court of the United States. Lipke v. Lederer, 259 U.S. 557, 562 (1922). No. 596. June 5, 1922.

Supreme Court of the United States. Loper Bright Enterprises v. Raimondo, 603 U.S. 369 (2024). No. 22-451. June 28, 2024.

Supreme Court of the United States. Rex Trailer Co. v. United States, 350 U.S. 148, 154 (1956). No. 46. January 9, 1956.

Supreme Court of the United States. Smith v. Doe, 538 U.S. 84 (2003). No. 01-729. March 5, 2003.

Supreme Court of the United States. United States v. Morton Salt Co., 338 U.S. 632, 644 (1950). February 6, 1950.

Supreme Court of the United States. United States v. Ward, 448 U.S. 242, 248, 249 (1980). No. 79-394. June 27, 1980.

Supreme Court of the United States. In re Winship, 397 U.S. 358 (1970). No. 778. March 31, 1970.

Abstract

Criminal and Administrative Liability Confounded: Regulatory Offences Under the European Convention on Human Rights and the U.S. Constitution

The paper explores how the growth of regulatory agencies and the increasing sophistication of administrative enforcement mechanisms have challenged the traditional distinction between civil and criminal liability. Focusing on the jurisprudence of the European Court of Human Rights and the U.S. Supreme Court, the authors analyse the Engel criteria and the Mendoza-Martinez test as the principal doctrinal frameworks used to determine whether formally administrative sanctions should be treated as criminal. The paper demonstrates that both courts rely on flexible, multi-factor approaches centred on punitive purpose, deterrent effect, severity of sanctions, and the substantive nature of the offence. At the same time, both frameworks remain imprecise and highly adaptable, creating uncertainty regarding the threshold at which criminal procedural safeguards become applicable.

The authors further argue that contemporary regulatory governance increasingly depends on creative and adaptive forms of administrative intervention that do not fit neatly within the conventional civil–criminal dichotomy. Regulatory agencies operate through soft law instruments, experimental governance techniques, guidance mechanisms, and broad discretionary powers that may substantially affect individual rights while formally remaining outside criminal law. The paper

concludes that the traditional bifurcation between civil and criminal liability has exhausted much of its explanatory and protective potential in the context of modern regulation. As a result, administrative law should move toward the development of its own autonomous procedural safeguards capable of addressing the realities of contemporary regulatory enforcement.

Keywords: administrative sanctions, criminal procedural safeguards, regulatory agencies, Engel criteria, Mendoza-Martinez test

Santrauka

Baudžiamosios ir administracinės atsakomybės susiliejimas: reguliaciniai pažeidimai pagal Europos žmogaus teisių ir pagrindinių laisvių apsaugos konvenciją ir Jungtinių Amerikos Valstijų Konstituciją

Straipsnyje analizuojama, kaip reguliavimo institucijų galios plėtra ir vis sudėtingesni administracinio poveikio mechanizmai kvestionuoja tradicinę civilinės ir baudžiamosios atsakomybės skirtį. Daugiausia dėmesio skirdami Europos Žmogaus Teisių Teismo ir JAV Aukščiausiojo Teismo jurisprudencijai, autoriai nagrinėja Engel kriterijus ir Mendoza-Martinez testą kaip pagrindinius doktrininius instrumentus, naudojamus nustatyti, ar taikomos administracinės priemonės turi būti laikomos baudžiamosiomis. Straipsnyje atskleidžiama, kad abu teismai remiasi lanksčiais vertinimo kriterijais, orientuotais į sankcijos baudžiamąjį tikslą, atgrasomąjį poveikį, griežtumą ir materialųjį pažeidimo pobūdį. Tačiau kartu abu šie modeliai išlieka netikslūs ir itin lankstūs, todėl kyla neapibrėžtumas dėl ribos, nuo kurios taikomos baudžiamojo proceso garantijos.

Autoriai teigia, kad šiuolaikinė administracinė teisė vis labiau grindžiama kūrybiškomis ir adaptyviomis administracinio poveikio formomis, kurios nebetelpa į tradicinę civilinės ir baudžiamosios teisės dichotomiją. Reguliuojančios institucijos veikia, pasitelkdamos minkštosios teisės instrumentus, eksperimentinio valdymo metodus, gaires ir rekomendacijas bei plačią diskreciją, galinčią reikšmingai paveikti asmenų teises, nors formaliai tokios priemonės ir nepatenka į baudžiamosios teisės sritį. Straipsnyje daroma išvada, kad tradicinė civilinės ir baudžiamosios atsakomybės dichotomija šiuolaikinės administracinės teisės kontekste išnaudojo savo apsauginį potencialą. Todėl administracinė teisė turėtų plėtoti savarankiškas procesines garantijas, gebančias atliepti reguliacinio poveikio realijas.

Pagrindiniai žodžiai: administracinės sankcijos, baudžiamojo proceso garantijos, sprendimą priimančios institucijos, Engelio kriterijai, Mendoza-Martinezo testas

The Intersections of Criminal, Administrative and Civil Law:
International and National Contexts, pp. 37–61
https://doi.org/10.12797/9788383685328.02

Andželika Vosyliūtė
Vilnius University, Faculty of Law
andzelika.vos@gmail.com

The Issue of Distinguishing Property Crimes from Administrative Offenses and Civil Torts in Lithuanian Judicial Practice and the Experience of Other Countries

1. Introduction

Chapter 28 of the Lithuanian Criminal Code (hereinafter referred to as the CC) provides for criminal liability for crimes and misdemeanours against property, property rights and property interests (hereinafter referred to as property crimes). These acts are dangerous, prohibited by criminal law, and for which penalty is provided. On the other hand, not only criminal, but also milder – administrative liability is provided for property acts, therefore this type of liability should at least be established for property acts of lesser danger. Although the legislator often provides criteria for the delimitation of these types of liability for property acts, which are usually associated with the value of the subject of the violation or the amount of damage caused, these delimitation criteria are criticised in the criminal law doctrine.[1] In addition, there are situations where the issue of delimiting responsibilities for these acts is left to judicial practice.

Moreover, the CC contains a number of property law norms that regulate private law relations, therefore the state should intervene in these legal relations only when the subjects of legal relations cannot resolve the situation peacefully.

1 Milda Markevičiūtė, "Administracinės atsakomybės samprata ir teisinio reguliavimo modelis Lietuvoje" (PhD diss., Vilniaus universitetas, 2022), 162.

State coercion should be applied only in exceptional cases, when normal legal relations cannot be restored in other ways. Scientists argue that the issue of the boundary between criminal acts and civil law violations is primarily a task of legislation. If this cannot be done at this stage, this issue is transferred to the level of application of the law. O. Fedosiukas points out that a significant part of criminal acts are committed by civil legal means and this is inevitable, since the terminology of civil law is also used in the creation of the CC. According to this scientist, the problem with distinguishing criminal and civil legal relations is twofold: there is an unclear boundary between these branches of law and a lot of room for interpretation, especially since the very illogicality, incompleteness, and lack of informativeness of the criminal law make that distinction problematic, so the burden of solving this problem falls on those who apply the law (judges).[2]

The article examines the criteria for distinguishing property crimes from other violations of the law, analyses the current practice of the Supreme Court of Lithuania (SCL) related to property crimes, and highlights the fundamental problems encountered in assessing specific property crimes from the aspect of criminal, administrative and civil liability. The criteria selected from case law are presented, based on which it is possible to distinguish what type of violation of the law was committed. The greatest attention is paid to those property crimes that are most difficult to distinguish from other violations of the law in court practice (theft, illegal use of energy and communication services, fraud, misappropriation or embezzlement of property, etc.). Attention is also drawn to the experience of other EU countries: Estonia and Latvia in the division of criminal, administrative and civil liability in relation to property crimes. The importance and practical significance of properly distinguishing property crimes from other violations of the law is emphasised.

2. Criteria for Distinguishing Crimes from Other Violations of the Law

The degree of dangerousness of the act and the principle of criminal law as the *ultima ratio* are the most important criteria in distinguishing criminal acts from other violations of the law. In the event of competition between the norms of the

[2] Olegas Fedosiukas, "Civilinių ir baudžiamųjų teisinių santykių atribojimas arba kaip teisėjui spręsti neišsprendžiamą problemą" (presentation at the conference Baudžiamosios ir civilinės teisės takoskyros beieškant, Vilnius University, 3 February 2020), Teisė.Pro (accessed 22 January 2025). https://www.teise.pro/index.php/2020/02/05/sprendziant-baudziamosios-ir-civilines-teises-atribojimo-problema-butina-vadovautis-protingumo-ir-teisingumo-kriterijais/.

CC, the Code of Administrative Offences (hereinafter referred to as the CAO) or the Civil Code, these elements are the main ones in determining which type of liability is applicable in a particular case.

Regarding the dangerousness of the act, the Constitutional Court of Lithuania notes that *only such acts may be recognised as criminal acts which are actually dangerous and which actually cause harm to the interests of an individual, society, or the state, or which pose a threat that such harm will be caused*.[3] In its ruling, the SCL states that *when deciding on the issues of determining the type of legal liability, the issues of the composition of the crime and criminal liability are first considered, and only after concluding that the dangerousness of the act does not reach the level that makes the act a crime are the issues of administrative liability considered*.[4] In addition, this court emphasises that *the dangerousness of the act: the criterion according to which the legislator differentiates torts into crimes, administrative and disciplinary offenses and civil legal relations [...] an act that formally complies with an article of the CC, but is not of a nature dangerous to society, cannot be considered a crime*.[5]

The doctrine of criminal law states that criminal acts are characterised by a high degree of danger, which means that only such acts can be criminalised that, by their nature and consequences, significantly violate the values protected by law. According to D. Pranka, when determining the degree of danger of a violation of the law (whether it is sufficient for criminalisation), the most important characteristics that must be taken into account are: the manner of committing the violation and the circumstances in which it is committed; the means and tools used; the form and type of guilt, as well as the goal pursued in committing the violation.[6]

Another essential criterion for distinguishing a criminal act from other branches of law – the principle of *ultima ratio* – provides that criminal liability shall be applicable only in exceptional cases when legal values cannot be protected by other legal or social means. The Constitutional Court of the Republic of Lithuania emphasises the importance of the principle of *ultima ratio* in legislation, stating that:

---

3 Constitutional Court of Lithuania, resolution of November 13, 1997, Valstybės žinios, no. 104-2644, November 19, 1997; Constitutional Court of Lithuania, resolution of December 6, 2000, Valstybės žinios, no. 105-3318, December 8, 2000; Constitutional Court of Lithuania. Resolution of January 16, 2006, Valstybės žinios, no. 7-254, January 19, 2006.

4 Supreme Court of Lithuania, ruling in criminal case no. 2K-7-76/2012, March 13, 2012.

5 Supreme Court of Lithuania, ruling in criminal case no. 2K-216/2013, April 30, 2013.

6 Darius Pranka, "Nusikalstamos veikos ir civilinės teisės pažeidimo atribojimo koncepcija Lietuvos baudžiamojoje teisėje" (PhD diss., Mykolas Romeris University, 2012), 35, 145.

only such acts may be recognized as criminal acts which are actually dangerous and which actually cause harm to the interests of the individual, society, or the state, or which pose a threat that such harm will be caused due to these acts, it is important to assess what results can be achieved by other means not related to the application of criminal penalties, measures of influence must be proportionate (adequate) to the violation of the law, must correspond to the legitimate and generally important goals pursued, and must not restrict the person obviously more than is necessary to achieve these goals.[7] The SCL states that: *criminal liability in a democratic society must be perceived as an extreme, last resort (ultima ratio), used to protect legal values in cases where the same goals cannot be achieved by milder measures*.[8]

Criminal law doctrine emphasises that the principle of *ultima ratio* should primarily be observed in legislation, justifying the necessity to criminalise or decriminalise violations of the law.[9] According to G. Svedas, *the prohibition of undesirable behavior in criminal law is possible only when it has no alternative measures in other branches of law, [...] otherwise a 'criminal society' can be created in which criminal acts will be greatly devalued*.[10] O. Fedosiukas points out that we can consider *ultima ratio* a principle of constitutional significance, because it can be considered to detail the principles enshrined in the constitution, and therefore it is binding on the legislator and the courts.[11] Other scholars note that in cases where the legislator includes a violation of the law in the criminal law, which is also classified as administrative liability, in such a case the courts are obliged to follow the principle of *ultima ratio* when applying the law and decide whether to apply criminal or administrative liability for the committed violation. When deciding on the issue of criminal liability, *ultima ratio* is manifested through the provision of economy of repression. Economy of repression is understood as the state's reaction to criminal acts based on the principle of minimal sufficiency, therefore imprisonment can only be a measure of last resort.[12] Thus, according to this principle, in the event of double liability for

7 Resolution of November 13, 1997; Resolution of of December 6, 2000; Resolution of January 16, 2006.

8 Supreme Court of Lithuania, ruling in criminal case No. 2K-262/2011, May 24, 2011.

9 Darius Pranka, "Lietuvos Respublikos baudžiamojo kodekso 179 straipsnyje numatyta nusikalstamą veiką ir civilinį teisės pažeidimą skirianti riba," *Socialinių mokslų studijos* 3, no. 2 (2011): 651.

10 Gintaras Švedas, "Veikos kriminalizavimo kriterijai: teorija ir praktika," *Teisė* 82 (2012): 18.

11 Oleg Fedosiuk, "Baudžiamoji atsakomybė kaip kraštutinė priemonė (*ultima ratio*): teorija ir realybė," *Jurisprudencija* 19, no. 2 (2012): 722.

12 Fedosiuk, "Baudžiamoji atsakomybė," 728.

a committed violation of the law, the application of a milder type of liability should be considered, after assessing the circumstances of the case.

In addition to these basic criteria (dangerousness of the act and the principle of ultima ratio), other criteria can be found in the doctrine of criminal law that must be assessed when making a decision to criminalise (decriminalise) a certain act, i.e. the prevalence of the act, the scope and limits of criminal law.[13] D. Pranka[14] and M. Markevičiūtė distinguish an even wider range of criteria. For example, M. Markevičiūtė additionally indicates the criteria of the law of the act's opposition and the primary objective pursued by the liability in order to distinguish between criminal and administrative liability.[15] In addition, different criteria may be used to distinguish individual categories of criminal acts from administrative or civil law violations. In the following, we will discuss the criteria by which the legislator and the courts distinguish property crimes from other legal violations.

3. Issues and Criteria for Distinguishing Property Crimes from Administrative Offenses

As mentioned above, one of the main criteria for distinguishing criminal acts from other violations of the law is the dangerousness of the act. The dangerousness of property acts is assessed at two levels: in laws and in judicial practice. Taking into account the nature and degree of danger of property acts, the legislator provides for administrative and criminal liability. Property criminal acts are distinguished from administrative offenses usually according to the value of the property or the amount of damage caused to it. For example, if the value of the stolen or damaged property is less than 3 MGL[16] (EUR 150), the person will be held administratively liable for petty theft, fraud, misappropriation and embezzlement of property (Art. 108 of the CAO) or intentional[17] destruction or

13 Švedas, "Veikos kriminalizavimo kriterijai," 23–24.

14 Pranka, "Nusikalstamos veikos," 46–47.

15 Markevičiūtė, "Administracinės atsakomybės samprata," 292, 311–312.

16 MGL (minimum standard of living) corresponds to the BBND (basic amount of penalties and fines), which is used to classify criminal acts and administrative offences and to define and calculate penalties and fines. *See*: The Parliament of the Republic of Lithuania, Law on the Amendment of Law No. X-1710 on the Determination of the Reference Indicators for Social Assistance Benefits and the Basic Amount of Penalties and Fines, no. XIII-820, December 5, 2017, TAR, no. 20046, December 13, 2017.

17 If negligent damage to another person's property does not exceed 3 MGL (EUR 150), the victim may seek compensation through civil proceedings.

damage to another's property (Art. 115 of the CAO). In this case, it is important that there are no signs of aggravating property offenses as provided for in the CC. Meanwhile, if the value of the stolen or damaged property exceeds 3 MGL (EUR150), the person will be held criminally liable, depending on the circumstances of the offense, for theft (Art. 178 of the CC), fraud (Art. 182 of the CC), misappropriation or embezzlement of property (Art. 183 or 184 of the CC), damage or destruction of property (Art. 187 of the CC). According to the value of the property – the acquisition or sale of property obtained by criminal means is distinguished from the acquisition or sale of small property obtained by illegal means. For example, if the value of the subject of this act is less than 3 MGL (EUR 150), the person will be held administratively liable under Art. 109 of the CC, and if it is exceeded – criminally liable under Art. 189 of the CC. According to the damage caused, the legislator distinguishes types of liability for acts related to the illegal use of energy or communication services. Administrative liability for unauthorised connection to energy or energy resource supply systems with damage up to 3 MGL (EUR 150). If this damage is greater, we will have criminal liability for the illegal use of energy and communication services (Art. 179 of the CC).

However, the legislator, when distinguishing between administrative and criminal liability for property offenses, does not always assess the systemic nature of the branches of law and lacks consistency. For example, until 1 January 2017 administrative liability for the acquisition or sale of illegally obtained property was not provided for in the CAO at all, and Art. 189 of the CC provided for liability for the acquisition or sale of criminally obtained property only when the value of such property exceeded 3 MGL (EUR 150). Thus, a situation arose where no liability was provided for the acquisition or sale of property obtained by criminal means, the value of which does not exceed 3 MGL (EUR 150). In addition, after the Law No XII-1481 (18 December 2014)[18] raised the threshold of criminal liability from 1 to 3 MGL (from EUR 50 to EUR 150) for the intentional destruction or damage of property of small value (Art. 187(3) of the CC), but without making any changes to the CAO (until 1 December 2017, the CAO provided for administrative liability for the intentional destruction or damage of property, when the damage caused to the victim did not exceed 1 MGL

[18] The Parliament of the Republic of Lithuania, Law on Amendments to Article 190 of the Criminal Code of the Republic of Lithuania, no. XII-1481, December 18, 2014, TAR, no. 21142, December 31, 2014.

(EUR 50)),[19] a situation arose where neither criminal nor administrative liability was provided for the intentional destruction or damage of property, the value of which is from 1 to 3 MGL (from EUR 50 to EUR 150). This gap was corrected only two years later by Law No XIII-753.[20]

In addition, in the theory of criminal law, the subject of an act, described by its quantity or value, which is used as a criterion for identifying the type of liability, is criticised. Legal science indicates that a flawed situation arises when the same act is prohibited by both criminal and administrative law norms, leaving the distinction between them only to the quantitative expression of the act. It is noted that, for example, theft should in all cases be qualified either as a crime, or as a misdemeanour, or as a minor violation, in order to achieve a clearer distinction between those acts that are criminal and those that are not. Therefore, it is proposed to delimit administrative offenses and criminal acts using the criterion of whether the punishment is for the violation of a value or for the violation of the procedure for the protection of such a value.[21] It is pointed out that in practice this aspect is not clearly revealed, as can be seen in the example of theft under discussion: the value that is intended to be damaged is essentially the same, only its quantitative criterion differs, but it is questionable whether this constitutes a basis for stating that the theft of property worth EUR 149 is less dangerous than property worth EUR 151. Of course, the law is formal and liability is applied to a person if an act has been committed that meets the established conditions. However, this example shows that such a criterion as the value of the property can be and is used in practice to define for which act criminal liability is applicable, and for which administrative liability, but it is not sufficient to distinguish these two types of liability in terms of value.[22]

Latvian law also provides for different types of legal liability for certain property crimes. For example, theft can be considered an administrative offense if the value of the stolen property does not exceed EUR 62 (Art. 167 of the Latvian CAO) or a criminal offense if the value of the stolen property exceeds EUR 62

19 The Parliament of the Republic of Lithuania, Code of Administrative Offences of the Republic of Lithuania, no. XII-1869, TAR, no. 11216, July 10, 2015.

20 The Parliament of the Republic of Lithuania, Law on Amendment of Articles 28, 29, 115, 227, 376, 379, 393, 396, 401, 403, 415, 426, 427, 428, 440, 464, 481, 482, 483, 484, 485, 488, 494, 573, 589, 595, 602, 610, 611, 681, 683, 685, 686 and the Annex to the Code of Administrative Offences of the Republic of Lithuania and Supplementing the Code with Articles 396-1, 413-1, no. XIII-753, November 16, 2017, TAR, no. 18803, November 28, 2017.

21 Albertas Čaplinskas et al., "Baudžiamosios ir administracinės atsakomybės atribojimo teorinės problemos," *Teisės problemos* 4, no. 46 (2004): 60–61.

22 Markevičiūtė, "Administracinės atsakomybės samprata," 162.

or the perpetrator systematically commits petty thefts with the prior intention to continue such activities (Art. 175 of the Latvian CC).[23] Meanwhile, in Estonia, only criminal liability is provided for property crimes, which is differentiated according to the seriousness of the act (depending on the value of the stolen property or the amount of damage caused to it), into property crimes (for example, theft (Art. 199 of the Estonian CC), robbery (Art. 200 of the Estonian CC), fraud (Art. 209 of the Estonian CC), etc.) and less serious property crimes (Art. 218 of the Estonian CC).[24] Thus, in Estonia, the issue of separating property crimes from administrative offenses does not arise. Therefore, having assessed the criticism expressed in the theory of criminal law regarding the subject of the act, described by its quantity or value, which is used as a criterion for identifying the type of liability, it is worth considering the expediency of following the Estonian example and abandoning administrative liability for property crimes in Lithuania.

Another problem encountered in Lithuanian judicial practice when separating administrative and criminal liability for property offences is the imprecise determination of aggravating features for these offences. The legislator, having assessed the degree of danger of the same property offence, constructs more dangerous – aggravating components of property offences (for example, pickpocketing, open theft, etc. (Art. 178(2) of the CC).[25] Considering that if at least one aggravating feature of a property offense is present, the offense becomes a crime, regardless of the value of the property, these features must be precisely defined in the criminal law. However, as case law shows, some aggravating features of property offenses are determined inaccurately, without assessing the greater danger of the act, therefore, this legislative defect often has to be corrected by the courts. For example, the element of pickpocketing defined in the law as the theft of another's property from a person's clothing, handbag or other item of luggage in a public place (Art. 178(2) of the CC) did not indicate a greater danger of this act, therefore, in order to substantiate its greater danger, it was interpreted more narrowly in court practice, i.e. by establishing an additional element to pickpocketing – the location of the clothing, handbag or item of luggage (possessed by the person).[26] In addition, after including pickpocketing in

23 Criminal Code of Latvia. Accessed July 22, 2025, https://legislationline.org/sites/default/files/2023-10/Criminal%20Code%20of%20Latvia.pdf.

24 Riigikogu, Criminal Code of Estonia, RT I 2001, 61, 364, June 6, 2001, Riigi Teataja.

25 Andželika Vosyliūtė, "Baudžiamoji atsakomybė už kvalifikuotą vagystę" (PhD diss., Vilnius University, 2009), 163–164.

26 Supreme Court of Lithuania, ruling in criminal case no. 2K-364/2005.

the list of aggravating theft, illogical situations arose, when a stolen item from a victim's handbag was assessed as a serious crime (pickpocketing), while if the entire handbag with its contents was stolen, the act was qualified according to the value of the stolen property, which was often assessed as a less dangerous criminal act or as an administrative offense. This situation was resolved in 2007, by introducing a new aggravating element of theft – open theft.[27] From this point of view, the latest amendments of the legislator are also to be criticised, according to which, by Law No XIV-3060,[28] a car was abolished as an element aggravating theft and a new element aggravating this act was established – breaking into a vehicle (Art. 178 (2) of the CC). Under the aforementioned regulation, a person who stole an item worth EUR 10 from a low-value car would have committed a serious crime (Art. 178 (2) of the CC), and if he stole a car with an item in it worth up to EUR 500, he would have committed a minor crime (Art.178 (1) of the CC). Moreover, if the value of such a car and the items in it did not exceed EUR 150, the person would be punished administratively (Art. 108 of the CAO). Therefore, the legislator's step of introducing a new element aggravating theft – 'breaking into a vehicle' – is to be criticised.

In court practice, the principle of *ultima ratio* usually aims to apply a milder type of liability than criminal liability,[29] but opposite situations can also be found. When the desired goals cannot be achieved by milder measures (for example, administrative punishment becomes ineffective), the court applies

27 The Parliament of the Republic of Lithuania, Law on Amendments to Articles 7, 38, 47, 63, 66, 70, 75, 82, 93, 129, 166, 167, 172, 178, 180, 181, 182, 183, 184, 185, 189, 194, 196, 197, 198, 1981, 1982, 199, 202, 213, 214, 215, 225, 227, 228, 231, 233, 235, 252, 256, 257, 262, 284, 285, 312 of the Criminal Code of the Republic of Lithuania, the Annex thereto and Addition, Change of Titles of Chapters XXVI, XXX and Addition of Articles 256-1, 257-1 to the Code, no. X-1233. June 28, 2007, Valstybės žinios, No. 81-3309, July 21, 2007.

28 The Parliament of the Republic of Lithuania, Law on Amendments to Articles 3, 60, 99, 100, 100-1, 100-2, 100-3, 103, 107, 108, 109, 123, 124, 125, 126, 127, 128, 129, 131, 132, 134, 135, 136, 137, 138, 139, 140, 142, 143, 145, 146, 147, 147-1, 147-2, 148, 149, 150, 151, 151-1, 152, 152-1, 156, 157, 159, 160, 161, 162, 169, 170, 170-1, 170-2, 172, 173, 174, 175, 176, 178, 180, 181, 182-1, 185, 188, 189, 189-1, 191, 192, 193, 194, 196, 197, 198, 198-1, 198-2, 202, 206, 207, 208, 209, 210, 213, 214, 215, 217, 218, 224, 229, 231, 232, 233, 234, 236, 238, 249-1, 250, 250-2, 250-4, 250-5, 251, 256, 256-1, 257, 257-1, 258, 259, 262, 265, 267, 267-1, 267-2, 267-3, 268, 270, 270-2, 270-3, 273, 274, 275, 276, 276-1, 276-2, 276-3, 277, 278, 279, 280, 281, 283, 285, 286, 287, 288, 289, 292, 292-1, 294, 295, 296, 297, 299, 300, 301, 302, 302-1, 303, 304, 306, 306-1, 306-2, 307, 308, 309, 310, 311, 312 and the Annex to the Criminal Code of the Republic of Lithuania, no. XIV-3060, November 7, 2024, TAR, no. 19686, November 12, 2024.

29 Supreme Court of Lithuania, rulings in criminal cases no. 2K-7-255/2012, November 2, 2012; no. 2K-7-9/2013; no. 2K-7-519/2006, no. 2K-7-47-895/2016, January 15, 2016; no. 2K-7-19-942/2017, January 12, 2017; no. 2K-7-82-699/2018, April 26, 2018; no. 2K-7-62-511/2018, April 4, 2018; no. 2K-7-66-648/2018, April 5, 2018; and no. 2K-7-152-895/2019.

criminal liability. The SCL, when interpreting the concept of continuous action in cases of petty theft, created the possibility of equating administrative thefts with criminal acts. The Court, revealing the content of the characteristic feature of continuous action – unified intent, indicated that *unified intent, connecting separate criminal acts, is characterised by the fact that the perpetrator himself perceives these actions as a single criminal act and, when committing the first act, already has a formed (initial) intention for another criminal act. Therefore, in cases where the intention to commit another criminal act arises after the first act, these acts are usually qualified as repeated*.[30] However, thefts of small-value property committed intentionally, with a prior intention to continue them, may incur criminal liability. For example, the court found that the perpetrator D.V. stole and attempted to steal other people's property – various goods – from different stores 70 times from 2018 to 2020. In each case of theft, the value of the stolen property did not reach the threshold for criminal liability. The court noted that *if the perpetrator deliberately steals small-value property in separate actions in order to avoid criminal liability, and in doing so has a prior common intention to continue such actions, there is a basis to recognise that a continuous criminal act, established by Art. 178 of the CC, was committed, and not many separate administrative offenses*.[31] It should be noted that such a rule is directly enshrined in the Latvian CC (Art. 175 of the Latvian CC).

4. Issues and Criteria for Distinguishing Property Crimes from Civil Torts

As mentioned above, due to the unclear dividing line between criminal and civil law, it is problematic to distinguish criminal and civil legal relations. Especially since there are no rules on how to do this, and certain criteria for distinguishing are not absolute, therefore, according to some scholars, it is necessary to rely on general principles of criminal and civil law, which, among other things, reveal the differences between these branches of law.[32] The doctrine of criminal law states that the functions and purpose of criminal law reveal the essence of this

30 Supreme Court of Lithuania, ruling in criminal case no. 2K-7-96/2012, April 17, 2012.

31 Supreme Court of Lithuania, ruling in criminal case no. 2K-P-51-719/2023, June 21, 2023.

32 "Sprendžiant baudžiamosios ir civilinės teisės atribojimo problemą, būtina vadovautis protingumo ir teisingumo kriterijais," *TeisėPro*, February 5, 2020, https://www.teise.pro/index.php/2020/02/05/sprendziant-baudziamosios-ir-civilines-teises-atribojimo-problema-butina-vadovautis-protingumo-ir-teisingumo-kriterijais/.

branch of law and show the main differences from civil law.[33] Although the characteristic of a criminal act – the seriousness and degree of danger and the principle of *ultima ratio* – should help to resolve the problems arising from the distinction between criminal acts and civil law violations when adopting and applying criminal laws, different criteria are often used to distinguish individual categories of criminal acts from civil law violations.[34] The issue of distinguishing property crimes from civil torts is most relevant when examining criminal cases involving theft, fraud, illegal use of energy and communications services, and misappropriation or embezzlement of property.

In court practice, there are problems in distinguishing theft from a civil tort, when the perpetrator uses another person's car without the purpose of appropriating it. Criminal liability for car theft, depending on its value, is provided for in Art. 178 of the CC. If the perpetrator uses another person's car without the purpose of appropriating it, the act is usually not considered theft, therefore the owner of the thing (car) may claim compensation for the damage suffered in civil proceedings, based on Art. 6.263(2) of the Civil Code. On the other hand, the purpose of theft is not specified in the disposition of Art. 178 of the CC. The doctrine of criminal law requires the determination of the purpose of appropriation in order to establish theft (O. Fedosiukas, A. Drakšienė, etc.).[35] Court practice regarding the purpose of appropriation as a necessary element for incriminating theft is ambiguous. In some cases, in the absence of the purpose of appropriation, persons are convicted, in others – acquitted. For example, the SCL notes that <...> *if the unlawful taking of another person's property is established, but if the intent to irreversibly take possession of another person's property and*

---

33 Criminal and civil law perform similar protective and regulatory functions, but they differ in their methods and scope of application. Criminal law protects public values only from the most dangerous violations and therefore operates subsidiarily, using an imperative method by prohibiting particularly dangerous acts and imposing punishments for their commission. In contrast, civil law applies a dispositive method, allowing parties to determine their rights, obligations, and liability within the framework established by law. The purpose of civil liability is not punishment, but restoration of violated rights, compensation for damage, and encouragement of proper performance of obligations. The degree of danger of a violation is assessed according to the manner and circumstances of the act, the means used, the form of guilt, and the offender's purpose. Criminal acts are distinguished by a particularly high degree of danger. *See*: Pranka, "Nusikalstamos veikos," 145.

34 Pranka, "Nusikalstamos veikos," 8.

35 *See,* for example, Andželika Vosyliūtė, "Automobilio pagrobimo samprata ir kvalifikavimo ypatumai teismų praktikoje," in *Lietuvos Respublikos baudžiamajam kodeksui – 10 metų,* ed. Gintaras Švedas (VĮ Registrų centras, 2011), 331; Armanas Abramavičius et al., *Baudžiamoji teisė. Specialioji dalis*, bk.1 (Eugrimas, 2001), 350.

cause the victim appropriate damage is not established, the act may be considered not to meet the criteria for property theft,[36] or *the actions of the perpetrator, when he clearly wants to use the thing only temporarily or takes possession of the thing without seeking to appropriate it and does not cause harm to the victim by such actions, are not recognised as theft*,[37] or *if the perpetrator clearly intends to use the thing only temporarily, intends to return it later, or otherwise does not seek to appropriate it, such an act does not constitute all the elements of theft*.[38] In other cases, the SCL noted that *an act is usually qualified as theft when a person takes another person's property (e.g. a car) with the intention of using it and without the intention of misappropriating it, but being indifferent to its fate (he can throw it away, give it to anyone or leave it anywhere, etc.), without the consent of the owner of the property or without his knowledge, a person takes possession of it, who is not connected to the owner by any family, work, contractual or similar relationship, and there is not (was not) an established practice between them, allowing the use of another person's property with the owner's consent, such an act is usually qualified as theft*.[39] Thus, in this case, the court notes that the purpose of appropriation is not necessary to incriminate theft.

The laws of many foreign countries, when defining theft, indicate the purpose of the seizure (taking) of another's property: with the aim of illegally appropriating the taken property (Art. 199 of Estonian CC, Art. 242 of German CC, Art. 370 of Hungarian CC, Swedish CC). According to the English Theft Act, the necessary element of theft is the aim to permanently separate the property from the owner (Theft Act 1968). In addition, many countries, avoiding to abandon the essential element of theft – the aim of appropriation, provide for criminal liability for the illegal use of a vehicle (Art. 335 of Canadian CC, Section 248b of German CC, Art. 494 of Turkish CC, Section 293a of Danish CC, Section 289 of Polish CC, Section 8, Chapter 7 of Swedish CC).[40] In order to avoid different court practices in cases of illegal temporary use of a vehicle and to avoid distorting the essence of theft, the possibility of providing for criminal liability for illegal temporary use

36 Supreme Court of Lithuania, rulings in criminal cases no. 2K-108/2013, January 8, 2013; 2K-517-303/2015, December 2, 2015; 2K-63-648/2016, January 26, 2016; 2K-406-507/2016, November 22, 2016; and 2K-187-895/2017, October 3, 2017.

37 Supreme Court of Lithuania, rulings in criminal cases no. 2K-187-895/2017 and no. 2K-61-489/2018, January 11, 2018.

38 Supreme Court of Lithuania, cases no. 2K-517-303/2015, no. 2K-63-648/2016, and no. 2K-406-507/2016.

39 Supreme Court of Lithuania, rulings in criminal cases no. 2K-212-511/2023, October 11, 2023; and no. 2K-211-511/2023, October 11, 2023.

40 Vosyliūtė, "Baudžiamoji atsakomybė už kvalifikuotą vagystę," 26.

of a vehicle in the Lithuanian CC, which, by the way, was provided for before 1 January 1995 in CC, should be considered.

In court practice, there are also problems in distinguishing civil tort from illegal use of energy and communication services, for which criminal liability is provided for under Art. 179 of the CC. Especially in cases where this criminal act is committed illegally and anonymously by connecting or distorting meter readings, and *by acting in another illegal manner*. The doctrine of criminal law emphasises that in such cases, when the victim and the perpetrator are connected by contractual relations, the application of criminal liability should be based on additional criteria indicating a higher degree of danger of the committed act: the element of fraud, the criterion of aggravation of the creditor's legal position. If these criteria are not established, priority should be given to civil measures for the restoration of rights.[41] The SCL has stated that *in the case of various minor breaches of the contract (for example, incorrect calculation of the payment amount, failure to pay on time for the things provided) civil liability shall be applied first*. Meanwhile, <...> *in the case of signs of aggravation of the creditor's situation or fraud (for example, it is necessary to contact the police to identify the culprit, distortion of meter readings makes it impossible to determine how much property was actually consumed, the consumer intentionally does not allow the supplier's representatives to check the meter readings) – criminal liability*.[42]

Criminal law theory emphasises that the main conditions for applying criminal, rather than civil, liability should be: unlawful methods of committing an act as defined in Art. 179 of the CC (detailed in other legal acts); non-reimbursability and causing material damage; significantly impaired rights of the creditor to restore the damage caused by means of civil proceedings (usually associated with the anonymity of the perpetrator or the secrecy of actions). Only if these conditions are met would criminal liability be reasonably applied. In addition, in all cases, contractual civil relations must have arisen between the parties.[43] For example, the SCL, while applying not civil but criminal liability under Art. 179 of the CC, noted that

> *in the case, two natural persons, from the very moment of recording the illegal actions, took active actions to disguise the commission of the criminal act, the restoration of the civil plaintiff's rights and compensation for damage became possible only by contacting law enforcement institutions, the crime*

41 Pranka, "Nusikalstamos veikos," 649–664.

42 Supreme Court of Lithuania, ruling in criminal case no. 2K-87-303/2023, April 27, 2023.

43 Pranka, "Lietuvos Respublikos baudžiamojo kodekso 179," 660; Supreme Court of Lithuania, case no. 2K-87-303/2023.

itself was clarified and the true circumstances of the commission of the act were established after conducting a complex pre-trial investigation. The joint illegal actions of two natural persons and a legal entity caused significant property damage, which is a feature of the criminal act specified in Art. 179(2) of the CC.[44]

Perhaps the most common problem encountered in court practice is the problem of distinguishing fraud from civil tort. In court practice, when distinguishing fraud from civil tort, the main criterion is the criterion of essentiality, and two additional criteria are distinguished. The criterion of essentiality means that the essential characteristic of fraud as a criminal act, which distinguishes it from a civil tort, is whether the deception used by the perpetrator was essential to the victim's decision to transfer property or conclude a transaction. In this case, the deception must have a decisive influence on the person's decision to transfer property to another person. If the person's deception did not have a decisive influence on the person's decision to transfer property, such deception does not make the act a crime of fraud. Additional two criteria: a) the criterion of aggravation of the creditor's legal position, which means that the creditor's ability to restore violated rights through civil legal means has been significantly impaired due to the debtor's actions. The perpetrator deliberately created a situation in which the victim could not restore his violated rights by civil legal means or such a method of protecting the violated rights would be significantly complicated; b) the criterion of careful and diligent conduct of the victim. According to the latter criterion, the deception used must overcome at least the minimum level of reasonable conduct of the victim. Therefore, in cases where the problem of delimitation of criminal and civil liability arises, if the above criteria are not established, priority is given to civil measures of restoration of rights.[45] In addition, the SCL noted that <...> *if the victim involved in a civil legal transaction is, due to his age, life experience, lifestyle, physical or mental characteristics, addictions, and other circumstances, a weak (vulnerable) party, i.e. a person whose credulity can be manipulated very easily, the criterion of careful and diligent conduct of the victim (Latin bonus pater familias) is not applicable to him in its entirety*.[46]

In other countries, such as Estonia, the main criterion for distinguishing fraud from civil tort, as in Lithuania, is the essence of the deception, i.e. the

44 Case no. 2K-87-303/2023.

45 Supreme Court of Lithuania, cases nos. 2K-7-255/2012, 2K-7-9/2013, 2K-7-519/2006, 2K-7-47-895/2016, 2K-7-19-942/2017, 2K-7-82-699/2018, 2K-7-62-511/2018, 2K-7-66-648/2018, and 2K-7-152-895/2019.

46 Supreme Court of Lithuania, ruling in criminal case no. 2K-7-136-489/2017, November 16, 2017.

presence of intent to deceive in the perpetrator's actions. Meanwhile, if there is no clear criminal intent, the case must be resolved in civil proceedings.[47]

Fraud cases often involve the drawing up of fictitious contracts and their use in committing fraud, which raises the issue of distinguishing between the qualification of drawing up such fictitious contracts as forgery of documents (Art. 300 of the CC) and a civil contract confirming an alleged or fictitious transaction (Art. 1.86-1.87 of the Civil Code). The SCL, when deciding on the issue of recognising contracts confirming alleged and fictitious transactions as forged documents in criminal cases, indicated the necessity not only to ensure that the data specified in the contract establish facts that do not exist in reality, but also to assess the significance and danger of the possible negative consequences of the contract itself, the threat posed by the true purposes of concluding the contract to the rights of third parties, the legal order and the interests of society.[48] For example, in one[49] of the cases, the court, qualifying the alleged contract as forgery of documents, indicated that

> *the alleged contracts were concluded only in order to avoid a sufficiently significant transfer tax on cars, especially freight cars, <...> the drawing up of vehicle rental contracts was inseparable from the fraudulent acts committed by the accomplices, <...> the drawing up of contracts pursued the sole purpose of creating a criminal scheme to obtain illegal material benefits at the expense of another legal entity, which poses a significant risk to the legal order and public interests, <...> the disclosure of the aforementioned alleged transactions and their harmful consequences became possible only by applying the measures of criminal procedure and no legal measures characteristic of any other branch of law were sufficient to achieve this goal*.[50]

47 Supreme Court of Estonia, ruling in criminal case no. 3-1-1-75-20, Riigikohus Court Decisions (accessed 28 July 2025). https://www.riigikohus.ee/en/court-decisions.

48 Supreme Court of Lithuania, ruling in criminal case no. 2K-7-66-788/2022, January 18, 2022.

49 The case established that UAB 'P' fictitiously transferred the management of its vehicles, mainly trucks, to UAB 'A' through sham vehicle lease agreements. UAB 'A', registered in the city of Neringa, formally qualified for permits allowing free ferry transport through the waters of the Port of Klaipėda. The convicted person, acting as the head of UAB 'A', submitted requests to the Neringa Municipality Administration for such permits together with the fictitious lease agreements as proof that the vehicles were managed by UAB 'A'. In reality, UAB 'A' neither conducted cargo transportation activities nor possessed the required license, while the transportation activities continued to be carried out by UAB 'P'.The courts concluded that the lease agreements constituted forgery of genuine documents and that their use to obtain free transportation services from Smiltynės perkėla amounted to fraud aimed at avoiding ferry service charges. *See:* Supreme Court of Lithuania, case no. 2K-7-66-788/2022.

50 Supreme Court of Lithuania, case no. 2K-7-66-788/2022.

Recently, there has been a lot of discussion about how to assess the activities of fortune tellers who defraud trusted clients of their funds. In one of the cases, the SCL, distinguishing magic from fraud, emphasised that

> <...>*the mere fact of providing services related to magic does not in itself constitute grounds for considering such an act as fraud, since it is impossible to objectively predict the desired result of such services. However, when a provider of magic services, taking advantage of the victim's gullibility, intentionally takes possession of the victim's property by using, as a deception, statements unfounded by objective data about threats to the life, health or property of the victim or his or her relatives, and this has a significant influence on the victim to conclude a transaction that is unprofitable to him or her, such an act shall be considered fraud*.[51]

In court practice, we will also find dilemmas in the delimitation of civil and criminal liability when examining cases of misappropriation or embezzlement of property. As stated in the doctrine of criminal law, the main reason that causes problems in separating misappropriation or embezzlement of property from a civil law violation is the subject of these acts (property or property right), which in all cases is entrusted or transferred to the knowledge of a person on the basis of civil legal relations.[52] The main criterion distinguishing civil and criminal liability in cases of this category is the criterion of aggravation of the creditor's legal position, which is distinguished by specific features: the perpetrator's actions must be deliberate in order to minimise the creditor's opportunities to recover the property as much as possible, the perpetrator's actions must be unlawful (i.e. in violation of the civil contracts on the basis of which the property was managed), due to the perpetrator's actions, it is practically impossible (in certain cases very difficult) to recover the misappropriated or embezzled property using civil legal measures. In cases of embezzlement of property, when assessing a transaction concluded by a trustee but detrimental to the trustee, the criteria for applying criminal liability should be the unlawfulness of this transaction, associated with the obviousness of exceeding authority and non-compliance with the standards of careful, prudent 'head of the family' behaviour (bonus pater familias), abuse of the trust granted, and the corresponding fault, which includes causing material damage. If these criteria

51 Supreme Court of Lithuania, ruling in criminal case no. 2K-7-41-511/2017, February 7, 2017.
52 Pranka, "Nusikalstamos veikos," 147.

are not established, priority should be given to civil measures for the restoration of violated rights. In addition, criminal liability should not be applied in cases where the head of a joint-stock company, although he illegally performed actions to dispose of the company's assets, did so not for personal purposes, but to meet the needs of the company.[53] The SCL, when deciding on the delimitation of criminal and civil liability in cases of misappropriation of property related to the failure to fulfil civil legal obligations arising from contractual relationships, noted that *the conclusion that the failure to fulfill contracts entails not only civil but also criminal liability is possible under certain additional conditions related to the objective difficulty of fulfilling concluded civil contracts, when one of the parties prevents the fulfilment of the contract by deliberate unlawful actions, which undermines the creditor's opportunities to restore the violated right through civil proceedings*.[54]

5. The Practical Significance of Distinguishing Property Crimes from Administrative Offenses or Civil Torts

The criminal law doctrine states that an objectively justified distinction between criminal acts and administrative violations of law in the norms of the CC and the CAO is a necessary condition for ensuring adequate sanctions and the coherence of their system, both in terms of the qualitative and quantitative characteristics of these sanctions. The system of criminal and administrative legal measures (sanctions) is coherent if it is: adequate to the values of a particular society, corresponds to the goals of the state legal policy, the purpose of the CC and the CAO and the sanctions themselves, proportionate to the system of acts prohibited by law (nature, dangerousness, etc.), coordinated (balanced) within the system of each code (the CC and the CAO) (internal coherence) and between the codes, as systems, with each other (external coherence), allows for individualisation of sanctions and ensuring the implementation of the principle of justice (correctly determined sizes of sanctions, rational reserves for them, etc.) and is effective and economically justified.[55]

---

53 Supreme Court of Lithuania, rulings in criminal cases no. 2K-P-78/2012, May 8, 2012; and 2K-7-84/2012, April 17, 2012.

54 Supreme Court of Lithuania, rulings in criminal cases no. 2K-7-388/2007, October 11, 2007; and 2K-7-198/2008, June 17, 2008.

55 Čaplinskas, "Baudžiamosios ir administracinės," 77.

As mentioned, criminal law as an *ultima ratio* is justified only when less severe measures (civil or public law) cannot effectively protect the legal values. All legal consequences of a criminal act must comply with the principles of the rule of law and proportionality.[56] After all, criminal law is a branch of law that has the strictest means of coercion at its disposal, the most restrictive of human rights, and the most depriving of freedom.[57] Therefore, if criminal, administrative or civil liability is not properly delimited, not only would the law be applied incorrectly, but disproportionate legal consequences would arise for the person who committed the violation.

Administrative offenses are less dangerous than crimes or criminal offenses. Therefore, it is obvious that the legal consequences and measures of these responsibilities also differ. Administrative liability, like civil liability, cannot cause consequences for a natural person that correspond in their meaning to the penalties imposed on a natural person related to the restriction of a person's physical freedom or separation from society, applied when holding a person criminally liable. For example, administrative offenses do not provide for a sentence of arrest or imprisonment, as is the case when imposing a sentence under the CC. Also, a sentence is imposed only upon conviction and only to a person who has committed a criminal act, while an administrative penalty may also be imposed on other persons.

In addition, a punishment imposed under the CC usually entails a criminal record, which causes negative consequences even after the person has already served the sentence imposed on him. For example, a ban on engaging in certain activities, acquiring a firearm, etc.[58] A criminal record is also significant after committing a new criminal act. Many types of exemption from criminal liability do not apply to a convicted person (Art. 39, 40 of the CC), often a postponement of the execution of the sentence (Art. 75 of the CC), when imposing a sentence for a newly committed criminal act, the provisions of Art. 55 of the CC cannot be applied to a convicted person, and according to Art. 27 of the CC, the court may recognise the convicted person as a recidivist and take it into account as an aggravating circumstance (Art. 60 (1) of the CC) when imposing a sentence for a new intentional act. As scientists note, administrative punishment can also be considered an aggravating circumstance, but the consequences of administrative liability are much smaller than in the case of a criminal

56 Johannes Wessels, *Baudžiamoji teisė. Bendroji dalis. Baudžiamoji veika ir jos struktūra* (Eugrimas, 2003), 28–29.

57 Pranka, "Lietuvos Respublikos baudžiamojo kodekso 179," 651.

58 Armanas Abramavičius et al., *Baudžiamoji teisė. Bendroji dalis* (Eugrimas, 2003), 466.

conviction.[59] Moreover, criminal liability can be brought against persons who were 16 years old at the time of the commission of the criminal act, in exceptional cases, liability is provided for from the age of 14 for especially dangerous acts, while administrative liability is possible only from the age of 16. Also, legal science indicates that administrative penalties do not entail the condemnation usually associated with the application of criminal liability.

6. Conclusions

The main criteria for distinguishing criminal acts from administrative offenses or civil torts are the seriousness of the act and the principle of *ultima ratio*. These principles must be observed by both the legislator and the courts. Different criteria may be used to distinguish a specific property crime from an administrative or civil violation.

The legislator usually distinguishes property crimes from administrative offenses based on the degree of danger of the act, which is determined by the value of the property, the amount of damage caused, and the establishment of an aggravating factor for the relevant property crime. However, the legislator does not always do this consistently and systematically, sometimes establishing imprecise and non-compliant factors qualifying a property crime as a high-risk offense.

Lithuanian court practice, taking into account the criterion of the dangerousness of the act, more clearly forms certain aggravating features of property crimes (pickpocketing, ect.), clarifies the concept of continuous theft in cases of repeated theft of low-value property and allows individuals to be held criminally liable if they knowingly steal low-value property through separate actions in order to avoid criminal liability, and in doing so have a prior common intention to continue such actions. The latter rule is directly enshrined in the Latvian Criminal Code.

In Estonia, only criminal liability is provided for property crimes, therefore the issue of separating property crimes from administrative offenses does not arise. Having assessed the criticism expressed in the theory of criminal law regarding the value of property as a criterion for distinguishing between criminal and administrative liability from a value perspective, it is worth considering the expediency of Lithuania to follow the Estonian example and abandon administrative liability for property offenses.

---

59 Stasys Šedbaras, *Administracinė atsakomybė. Vadovėlis* (Justitia, 2005), 98.

When distinguishing property crimes from civil torts, the criterion of aggravation of the creditor's legal position is most often used in court practice, which means that the creditor's ability to restore the violated rights by civil legal means is significantly impaired due to the perpetrator's actions. This criterion can be used as the main one, for example, when distinguishing misappropriation or embezzlement of property from civil torts, or as an additional one (when distinguishing civil torts from illegal use of energy and communication services and fraud). In addition to this criterion, it may be required to establish the following criteria: as illegal methods of committing the act; gratuitousness and causing property damage (in order to incriminate illegal use of energy and communication services) or the essence of the fraud (the fraud used by the perpetrator was essential for the victim's decision to transfer the property or conclude a transaction) and an additional criterion (careful and diligent behavior of the victim) – in the case of fraud. In Estonia, the main criterion for distinguishing fraud from civil tort is the seriousness of the deception.

Inappropriate delimitation of criminal, administrative and civil liability for property acts not only implies incorrect application of laws, but may also lead to disproportionate legal consequences for the person who committed the violation.

References

Legislation

Riigikogu. Criminal Code of Estonia. RT I 2001, 61, 364. June 6, 2001. Riigi Teataja.

The Parliament of the Republic of Lithuania. Code of Administrative Offences of the Republic of Lithuania. No. XII-1869. TAR. No. 11216. July 10, 2015.

Criminal Code of Latvia. Accessed July 22, 2025. Legislationline.

The Parliament of the Republic of Lithuania. Law on the Amendment of Law No. X-1710 on the Determination of the Reference Indicators for Social Assistance Benefits and the Basic Amount of Penalties and Fines. No. XIII-820. December 5, 2017. TAR. No. 20046. December 13, 2017.

The Parliament of the Republic of Lithuania. Law on Amendments to Article 190 of the Criminal Code of the Republic of Lithuania. No. XII-1481. December 18, 2014. TAR. No. 21142. December 31, 2014.

The Parliament of the Republic of Lithuania. Law on Amendment of Articles 28, 29, 115, 227, 376, 379, 393, 396, 401, 403, 415, 426, 427, 428, 440, 464, 481, 482,

483, 484, 485, 488, 494, 573, 589, 595, 602, 610, 611, 681, 683, 685, 686 and the Annex to the Code of Administrative Offences of the Republic of Lithuania and Supplementing the Code with Articles 396-1, 413-1. No. XIII-753. November 16, 2017. TAR. No. 18803. November 28, 2017.

The Parliament of the Republic of Lithuania. Law on Amendments to Articles 7, 38, 47, 63, 66, 70, 75, 82, 93, 129, 166, 167, 172, 178, 180, 181, 182, 183, 184, 185, 189, 194, 196, 197, 198, 1981, 1982, 199, 202, 213, 214, 215, 225, 227, 228, 231, 233, 235, 252, 256, 257, 262, 284, 285, 312 of the Criminal Code of the Republic of Lithuania, the Annex thereto and Addition, Change of Titles of Chapters XXVI, XXX and Addition of Articles 256-1, 257-1 to the Code. No. X-1233. June 28, 2007. Valstybės žinios. No. 81-3309. July 21, 2007.

Parliament of the Republic of Lithuania. Law on Amendments to Articles 3, 60, 99, 100, 100-1, 100-2, 100-3 [...] and the Annex to the Criminal Code of the Republic of Lithuania. No. XIV-3060. November 7, 2024. TAR. No. 19686. November 12, 2024.

Case Law

Constitutional Court of Lithuania. Resolution of January 16, 2006. Valstybės žinios. No. 7-254. January 19, 2006.

Constitutional Court of Lithuania. Resolution of December 6, 2000. Valstybės žinios. No. 105-3318. December 8, 2000.

Constitutional Court of Lithuania. Resolution of November 13, 1997. Valstybės žinios. No. 104-2644. November 19, 1997.

Supreme Court of Lithuania. Ruling in criminal case no. 2K-P-51-719/2023. June 21, 2023.

Supreme Court of Lithuania. Ruling in criminal case no. 2K-212-511/2023. October 11, 2023.

Supreme Court of Lithuania. Ruling in criminal case no. 2K-211-511/2023. October 11, 2023.

Supreme Court of Lithuania. Ruling in criminal case no. 2K-87-303/2023. April 27, 2023.

Supreme Court of Lithuania. Ruling in criminal case no. 2K-7-66-788/2022. January 18, 2022.

Supreme Court of Lithuania. Ruling in criminal case no. 2K-7-82-699/2018. April 26, 2018.

Supreme Court of Lithuania. Ruling in criminal case no. 2K-7-62-511/2018. April 4, 2018.

Supreme Court of Lithuania. Ruling in criminal case no. 2K-7-66-648/2018. April 5, 2018.
Supreme Court of Lithuania. Ruling in criminal case no. 2K-61-489/2018. January 11, 2018.
Supreme Court of Lithuania. Ruling in criminal case no. 2K-187-895/2017. October 3, 2017.
Supreme Court of Lithuania. Ruling in criminal case no. 2K-7-136-489/2017. November 16, 2017.
Supreme Court of Lithuania. Ruling in criminal case no. 2K-7-41-511/2017. February 7, 2017.
Supreme Court of Lithuania. Ruling in criminal case no. 2K-7-19-942/2017. January 12, 2017.
Supreme Court of Lithuania. Ruling in criminal case no. 2K-406-507/2016. November 22, 2016.
Supreme Court of Lithuania. Ruling in criminal case no. 2K-63-648/2016. January 26, 2016.
Supreme Court of Lithuania. Ruling in criminal case no. 2K-7-47-895/2016. January 15, 2016.
Supreme Court of Lithuania. Ruling in criminal case no. 2K-517-303/2015. December 2, 2015.
Supreme Court of Lithuania. Ruling in criminal case no. 2K-216/2013. April 30, 2013.
Supreme Court of Lithuania. Ruling in criminal case no. 2K-108/2013. January 8, 2013.
Supreme Court of Lithuania. Ruling in criminal case no. 2K-7-9/2013.
Supreme Court of Lithuania. Ruling in criminal case no. 2K-P-78/2012. May 8, 2012.
Supreme Court of Lithuania. Ruling in criminal case no. 2K-7-255/2012. November 2, 2012.
Supreme Court of Lithuania. Ruling in criminal case no. 2K-7-96/2012. April 17, 2012.
Supreme Court of Lithuania. Ruling in criminal case no. 2K-7-84/2012. April 17, 2012.
Supreme Court of Lithuania. Ruling in criminal case no. 2K-7-76/2012. March 13, 2012.
Supreme Court of Lithuania. Ruling in criminal case no. 2K-262/2011. May 24, 2011.
Supreme Court of Lithuania. Ruling in criminal case no. 2K-7-198/2008. June 17, 2008.
Supreme Court of Lithuania. Ruling in criminal case no. 2K-7-388/2007. October 11, 2007.
Supreme Court of Lithuania. Ruling in criminal case no. 2K-364/2005.
Supreme Court of Estonia. Ruling in criminal case no. 3-1-1-75-20. Accessed July 28, 2025.

Books

Abramavičius, Armanas, Alfonsas Čepas, Anna Drakšienė et al. *Baudžiamoji teisė. Bendroji dalis*. Eugrimas, 2003.

Abramavičius, Armanas, Egidijus Bieliūnas, Anna Drakšienė et al. *Baudžiamoji teisė. Specialioji dalis*. Book 1. Eugrimas, 2001.

Šedbaras, Stasys. *Administracinė atsakomybė. Vadovėlis*. Justitia, 2005.

Wessels, Johannes. *Baudžiamoji teisė. Bendroji dalis. Baudžiamoji veika ir jos struktūra*. Eugrimas, 2003.

Articles and Academic Publications

Čaplinskas, Albertas, Antanas Dapšys, and Jonas Misiūnas. "Baudžiamosios ir administracinės atsakomybės atribojimo teorinės problemos." *Teisės problemos* 4, no. 46 (2004): 44–82.

Fedosiuk, Oleg. "Baudžiamoji atsakomybė kaip kraštutinė priemonė (*ultima ratio*): teorija ir realybė." *Jurisprudencija* 19, no. 2 (2012): 715–738.

Pranka, Darius. "Lietuvos Respublikos baudžiamojo kodekso 179 straipsnyje numatyta nusikalstamą veiką ir civilinį teisės pažeidimą skirianti riba." *Socialinių mokslų studijos* 3, no. 2 (2011): 649–664.

Švedas, Gintaras. "Veikos kriminalizavimo kriterijai: teorija ir praktika." *Teisė* 82 (2012): 12–25.

Vosyliūtė, Andželika. "Automobilio pagrobimo samprata ir kvalifikavimo ypatumai teismų praktikoje." In *Lietuvos Respublikos baudžiamajam kodeksui – 10 metų*, edited by Gintaras Švedas. VĮ Registrų centras, 2011.

Dissertations

Markevičiūtė, Milda. "Administracinės atsakomybės samprata ir teisinio reguliavimo modelis Lietuvoje." PhD diss., Vilnius University, 2022.

Pranka, Darius. "Nusikalstamos veikos ir civilinės teisės pažeidimo atribojimo koncepcija Lietuvos baudžiamojoje teisėje." PhD diss., Mykolas Romeris University, 2012.

Vosyliūtė, Andželika. "Baudžiamoji atsakomybė už kvalifikuotą vagystę." PhD diss., Vilnius University, 2009.

Online Sources and Conference Presentations

Fedosiukas, Olegas. "Civilinių ir baudžiamųjų teisinių santykių atribojimas arba kaip teisėjui spręsti neišsprendžiamą problemą" (presentation at the conference *Baudžiamosios ir civilinės teisės takoskyros beieškant*, Vilnius University, February 3, 2020). *TeisėPro*. February 5, 2020. https://www.teise.pro/index.php/2020/02/05/sprendziant-baudziamosios-ir-civilines-teises-atribojimo-problema-butina-vadovautis-protingumo-ir-teisingumo-kriterijais/.

"Sprendžiant baudžiamosios ir civilinės teisės atribojimo problemą, būtina vadovautis protingumo ir teisingumo kriterijais," *TeisėPro*, February 5, 2020, https://www.teise.pro/index.php/2020/02/05/sprendziant-baudziamosios-ir-civilines-teises-atribojimo-problema-butina-vadovautis-protingumo-ir-teisingumo-kriterijais/.

Abstract

The issue of distinguishing property crimes from administrative offenses and civil torts in lithuanian judicial practice and the experience of other countries

The article analyses the current practice of the Supreme Court of Lithuania related to property crimes, highlights the essential problems encountered when assessing individual property crimes from the aspect of criminal, administrative and civil liability, presents the criteria selected from case law, based on which it is possible to distinguish what type of violation of law was committed. The greatest attention is paid to property crimes that cause the most problems in case law, such as theft, illegal use of energy and communication services, fraud, misappropriation or embezzlement of property, destruction or damage to property. Attention is also drawn to the experience of other EU countries: Estonia, Latvia in the division of criminal, administrative and civil liability. The importance and practical significance of the proper separation of property crimes from other violations of law is emphasised.

Keywords: property crimes, delimitation criterions, civil tort, administrative law offense, crime

Santrauka

Turtinių nusikalstamų veikų atribojimo nuo administracinių nusižengimų bei civilinių deliktų problematika Lietuvos teismų praktikoje ir kitų šalių patirtis

Straipsnyje nagrinėjama aktuali Lietuvos Aukščiausiojo Teismo praktika, susijusi su turtinėmis nusikalstamomis veikomis, išryškinamos esminės problemos, su kuriomis susiduriama vertinant atskiras turtines nusikalstamas veikas baudžiamosios, administracinės ir civilinės atsakomybės aspektu, pateikiami teismų praktikos atrinkti kriterijai, kuriais remiantis galima atskirti, kokios rūšies teisės pažeidimas buvo padarytas. Didžiausias dėmesys skiriamas daugiausiai problemų teismų praktikoje sukeliančioms turtinėms veikoms, tokioms kaip vagystė, neteisėtas naudojimasis energija ir ryšių paslaugomis, sukčiavimas, turto pasisavinimas ar išvaistymas, turto sunaikinimas ar sugadinimas. Atkreipiamas dėmesys ir į kitų ES šalių: Estijos, Latvijos patirtį baudžiamosios, administracinės ir civilinės atsakomybės takoskyroje. Pabrėžiama turtinių nusikalstamų veikų tinkamo atribojimo nuo kitų teisės pažeidimų svarba ir praktinė reikšmė.

Pagrindiniai žodžiai: turtiniai nusikaltimai, atribojimo kriterijai, civilinė deliktinė atsakomybė, administracinis nusižengimas, nusikaltimas

The Intersections of Criminal, Administrative and Civil Law:
International and National Contexts, pp. 63–95
https://doi.org/10.12797/9788383685328.03

Ramunė Žiedė
Vilnius University, Faculty of Law
ramune.ziede@tf.vu.lt

Ramūnas Birštonas
Vilnius University, Faculty of Law
ramunas.birstonas@tf.vu.lt

Problems of the Distinction Between Different Types of Legal Liability for Misappropriation of Authorship

1. Introduction

It is said that misappropriation of authorship emerged at the same time as creativity. As far as we know, the oldest recorded case of such misappropriation dates back to the 4th century BCE, when the Greek philosopher Heraclides Ponticus was accused of appropriating another author's – Camaeleon's – work on Hesiod and Homer.[1] Around the 80s CE, the Roman poet Martial popularised the term 'plagiarism' by accusing his fellow poet Fidentinus of stealing his verses. During that period, the misappropriation of authorship was viewed as unequivocally reprehensible and dishonourable behaviour, but legal liability, as far as is known, was not applied. The situation is different in our times: states establish various forms of legal liability for the misappropriation of authorship. This is also linked to the increased importance of intellectual property and the recognition of its significance. Lithuania is no exception; its legal system establishes civil, criminal, and administrative liability for misappropriation of

1 Matthew A. McIntosh, "Authorship, Authenticity, and Intellectual Theft Ancient Greece and Rome," *Brewminate: A Bold Blend of News and Ideas*, April 8, 2026, https://brewminate.com/ancient-plagiarism-greece-rome/.

authorship. On the one hand, this may reflect the state's concern that copyright should not be infringed; on the other hand, the existence of different types of liability raises the question in which cases which type of liability applies, what their relationship is, including whether they can be applied together, and the directly related question – whether the principle of *non bis in idem* is not violated in such a case. The issue of the different types of liability for misappropriation of authorship in Lithuania has not yet received due attention in either national or foreign literature. Previous, rather limited, academic analyses simply discussed each of the three responsibilities mentioned separately, focusing primarily on explaining the conditions under which they apply.[2] Meanwhile, their relationship and the criteria for distinguishing them remain unclear.

The subject matter of this paper is limited in two respects. On the one hand, it is limited by the nature of the infringement – namely, the misappropriation of authorship. Thus, the article does not address the issue of infringements of other moral or economic rights of the author. Second, the study is limited to three types of liability: civil, administrative, and criminal, and does not delve into other possible types of liability; nor does it separately analyse the related issue of violations of academic ethics.

The article employs methods of document analysis, systematic analysis, analysis of judicial practice, descriptive statistics, and linguistic analysis. The document analysis method was applied to conduct a qualitative examination of the texts of current legislation and sources of legal doctrine related to the establishment of criminal, administrative, and civil liability for misappropriation of authorship. The systematic-comparative method was also used to compare the elements of misappropriation of authorship with similar crimes, administrative offenses, or civil law violations, and by assessing the relationship between the elements of misappropriation of authorship established in Article 191 of the Criminal Code of the Republic of Lithuania (hereinafter – the CC) and the administrative offenses established in Articles 122 and 123 of the Code of Administrative Offenses of the Republic of Lithuania (hereinafter – the CAO), as well as civil law

2 Mindaugas Kiškis and Gintautas Šulija, "Baudžiamoji atsakomybė už intelektinės nuosavybės teisių pažeidimus Europos valstybėse," *Teisė* 49 (2003): 52–65, https://etalpykla.lituanistika.lt/fedora/objects/LT-LDB-0001:J.04~2003~1367189688000/datastreams/DS.002.0.01.ARTIC/content; Vytautas Mizaras, *Autorių teisė. Volume I* and *Volume II* (Justitia, 2008, 2009); Girius Ivoška, "Commentary on Article 191 of the Criminal Code," in *Lietuvos Respublikos baudžiamojo kodekso komentaras. Specialioji dalis (99-212 straipsniai)*, edited by Gintaras Švedas (Registrų centras, 2009), 395–402; Ramūnas Birštonas et al., *Intelektinės nuosavybės teisė*, (VĮ Registrų centras, 2010); Ramunė Žiedė, "Criminal Liability for the Misappropriation of Authorship from 1830s to Early 20th Century," *Teisė* 120 (2021): 83–103, and others.

violations. The linguistic method is significant for the study in that it helped to clarify certain concepts used in Article 191 of the CC and the Law on Copyright and Related Rights of the Republic of Lithuania (hereinafter – the LCRR), as well as their content. A comprehensive empirical study was also conducted, combining methods of descriptive statistics, case law analysis, and comparative analysis: all publicly available Lithuanian case law from January 1, 2005, to December 31, 2024, accessible in the court decision databases and search engines 'Liteko.teismai' and 'Infolex' in cases involving misappropriation of authorship, in an attempt to determine whether there is a connection between the presence of certain elements of this offense and the type of liability applied. The analysis of case law aims to draw a distinction between different types of liability for misappropriation of authorship by presenting criteria according to which cases should be classified under civil, administrative, or criminal law.

2. Civil Liability for Misappropriation of Authorship

The primary Lithuanian law regulating copyright issues is the LCRR. Among other matters, it provides a fundamental distinction in copyright law characteristic of the entire continental copyright tradition: first, moral rights, which are non-transferable and perpetual, and, second, economic rights, which the author may freely dispose of, for example, by selling them; furthermore, these rights remain in force for 70 years after the author's death.[3] Further, the LCRR distinguishes three moral rights: the right of authorship, the right to the author's name, and the right to the integrity of the work. As mentioned, this article examines only the first, i.e. the right of authorship. Article 14(1)(1) of the LCRR grants the author the right *to demand recognition of the authorship of the work by clearly indicating the author's name on all copies of the published work, as well as by publicly performing the work in any other possible manner (right of authorship)*. Article 6 of the LCRR must also be applied in conjunction with this article; it stipulates that an author can only be a natural person, that is, the person who created the work.

LCRR also establishes civil liability for infringement of authors' moral rights. Although it is not classified as a specific tort, Article 73 of the LCRR establishes the general concept of infringement of copyright, namely, *acts that infringe*

[3] Ramūnas Birštonas, Jūratė Liauksminaitė and Vytautas Mizaras, *Lietuvos Respublikos autorių teisių ir gretutinių teisių įstatymo komentaras* (Vilniaus universiteto leidykla, 2024), 241.

upon any copyright protected by this Act and other laws, meaning the right of authorship as well. The infringement of authorship giving rise to civil liability is not defined in greater detail. In practice, the latter most often manifests itself as: a) failure to acknowledge or disputing authorship, regardless of whether the work is used or not; b) using a work without indicating the author's name; c) indicating a fictitious co-author (or co-authors); d) another person is named as the author. Thus, the right of authorship is broadly defined: as can be seen, it can manifest itself not only through the misappropriation of authorship, but also, for example, through the failure to indicate the name, even though the infringer does not misappropriate the authorship. However, misappropriation of authorship also falls within the scope of the right in question and is considered the most serious violation thereof.

Thus, in the event of a violation of copyright, the injured party (i.e., the author) may rely on the civil remedies established in Article 77 of the LCRR, such as recognition of rights, an order to cease unlawful actions, restoration of infringed moral rights (an order to make necessary corrections, to publish a notice of the infringement in the press or by other means), or compensation for pecuniary and non-pecuniary damages. Notably, the perpetrator's fault is only required when claiming pecuniary and non-pecuniary damages; for other civil remedies, fault is not a prerequisite.

Meanwhile, the LCRR does not directly regulate administrative or criminal liability; only Article 87 of the LCRR states that *Administrative and criminal liability for infringements of copyright, related rights, and sui generis rights is established by the Code of Administrative Offences of the Republic of Lithuania and the Criminal Code of the Republic of Lithuania*.

Such regulation across three acts raises the question of whether all three types of liability are independent.

Civil liability for misappropriation of authorship is the most universal and flexible of the applicable types of liability; therefore, it must remain the broadest option and be applied cumulatively. Since this type of liability can be applied together (or in parallel) with criminal or administrative liability, neither the issue of demarcation, nor the violation of the *non bis in idem* principle does not arise.

A search of civil case law from January 1, 2005,[4] to December 31, 2024, including district court rulings, using the four search keywords 'plagiarism', 'misappropriation of authorship', 'misappropriated authorship', and 'Article 191', the search engines of 'Infolex' and 'Liteko.teismai' found a total of 48

4 Data collection in the LITEKO database began in 2005.

unique case numbers. After manually consolidating the case numbers based on the case number and content of the judicial proceedings and removing duplicate cases, it is evident that the databases provided a total of 37 distinct case scenarios, which, following an analysis of their content, were marked as either related or unrelated to misappropriation of authorship:

1. 19 case numbers were identified under the keyword 'plagiarism', corresponding to 15 distinct factual situations; of these, 7 factual situations are related to misappropriation of authorship;
2. under the keywords 'misappropriation of authorship' – 6 case numbers (5 factual situations of cases), of which 3 factual situations are related to misappropriation of authorship;
3. by the keywords 'misappropriated authorship' – 22 case numbers (18 different factual situations), of which 12 are related to misappropriation of authorship;
4. by the keywords 'Article 191' – 10 case numbers (8 factual situations), related to misappropriation of authorship – 4 factual situations.

When combining the relevant situations presented under all keywords, it can be seen that there are actually 16 civil cases (factual situations) involving misappropriation of authorship (see *Table 1* below).

Table 1. Volume of case law in civil cases by keywords

		Keywords (civil cases)			
		'Plagiarism'	**'Misappropriation of authorship'**	**'Misappropriated authorship'**	**'Article 191'**
Results	Number of results	19	6	22	10
	Number of unrelated results	10	3	7	5
	Number of related results	9	3	15	5

		Keywords (civil cases)			
		'Plagiarism'	**'Misappropriation of authorship'**	**'Misappropriated authorship'**	**'Article 191'**
Factual situations	Number of situations	15	5	18	8
	Number of unrelated situations	8	2	7	5
	Number of related situations	7	3	11	3
Total number of different factual situations		16			

Compiled by author R. Žiedė

It should be acknowledged that the case numbers cited here relate not only to situations where a person who has been the victim of misappropriation of authorship turns to the courts to defend their rights, naming the person who violated this right as the defendant, but also to other cases where it is evident that misappropriation of authorship has occurred. For example, in the Vilnius Regional Court's ruling of February 1, 2012, in civil case No. 2A-1366-661/2012, the plaintiff, D. R., is a former student expelled from his studies for plagiarism, and the defendant is Vilnius University, which expelled the student; meanwhile, the author whose work was plagiarised did not participate in the case. However, even with such an expanded search, there are very few cases of misappropriation of authorship, given the scope of nearly 20 years of judicial practice.

3. Administrative Liability for Misappropriation of Authorship

Moving to the analysis of administrative liability, it should be noted that, as of January 1, 2017, administrative liability for violations of copyright and related rights in Lithuania arises not under a single article of the CAO, but under two: Article 122 and Article 123.

Article 122(1) of the CAO, 'Violation of Copyright and Related Rights' provides for administrative liability for *the unlawful public performance, reproduction, publication, or other use by any means or methods of a literary, scientific, or artistic work (including computer programs and databases) or an object of related rights, or a part thereof, by any means or methods for non-commercial purposes, as well as the distribution, transportation, or storage of unlawful copies of a work or an object of related rights for commercial purposes*. Although broadly worded, the article refers only to the types of economic rights established in Article 15 of the LCRR; therefore, it must be concluded that Article 122 of the CAO applies only to infringements of the author's economic rights, whereas it does not cover infringements of moral rights (including, the right of authorship). Therefore, if the 'unlawfulness' consists solely of an infringement of the right of authorship, this administrative offense will be deemed not to have been committed.

Article 123 of the CAO is more relevant for imposing administrative liability for misappropriation of authorship, as it establishes liability for the following acts:

1. Submitting a draft of a scientific or academic work (or part thereof) prepared by another person to a scientific or academic institution as one's own scientific or academic work (or part thereof) shall result in an <administrative penalty>.

2. The preparation and/or transfer of a draft of a scientific or academic work (or part thereof) that was submitted by another person to a scientific or academic institution as their own scientific or academic work (or part thereof) shall result in an <administrative penalty>.

3. The public disclosure of information offering services for the preparation of a draft of a scientific or academic work (or part thereof) shall result in an <administrative penalty>" <...>.

Thus, Article 123 of the CAO establishes a specific form of misappropriation of authorship in the academic environment, including cases where the victim himself/herself consents to such a violation by selling the work.

For a long time, there has been a heated debate in society about how to curb this activity, which is harmful to both the public and the academic community and which, until then, had been unjustifiably regarded as a legitimate form of economic activity, even though all those involved in this activity were aware of an immoral goal, i.e., by misappropriating the authorship of this work, despite the fact that the author's moral rights are not transferable (Article 14(2) of the LCRR)[5]. Prior to the codification of this offense in the CAO, there

[5] Vilnius City District Court, ruling in civil case no. 2-3992-905/2013, March 20, 2023. At this point, attention should be drawn to the difference between the concepts of 'plagiarism' and 'misappropriation of authorship': it is also visible in the case when the originality of a purchased course or master's thesis is assessed – a work created specifically according to the needs of

was a gap between the complete impunity of dangerous acts and overly strict (criminal) liability, distinguished by a single criterion, that is by the victims' (i.e. the authors') consent to infringe upon their copyright by waiving it and transferring it for money to another person (the client of the scientific or other work). Since the victim permits the infringement of their rights, the act loses its harm,[6] and therefore criminal liability was essentially impossible; however, by not treating this as an administrative offence, actions harmful to society remain generally unaddressed by the state, and the problem was left to be resolved solely by the internal regulations of the higher education institutions.

With regard to the content of these provisions, the legal rules establishing criminal and administrative liability must be coordinated with one another as a coherent system that classifies acts according to their level of harm. Article 123 of the CAO establishes the elements of an administrative offense that may overlap with the misappropriation of authorship. In particular, Article 123(1) of the CAO establishes a provision providing for liability (to paraphrase) for submitting a draft of another person's scientific or academic work to a scientific or academic institution as one's own, competes with misappropriation of authorship in Article 191 of the CC as the former establishes a specific form of misappropriation of authorship in an academic setting. Meanwhile, the liability established in Article 123(2) of the CAO for the preparation and/or transfer of such work, and in Article 123(3) for the advertising of such services, does not compete with Article 191 of the CC and could raise questions only regarding complicity in committing the act established in paragraph 1; however, in such a case, authorship is misappropriated with the knowledge and consent of the victim (author), which negates the harm (dangerous nature) of the act, and criminal liability does not arise in such cases.[7]

A search of court practice in administrative cases from January 1, 2005, to December 31, 2024, including district court rulings, was conducted using all

---

the customer cannot be considered plagiarism if it is not plagiarised from anything, but is an original result of creative activity, only its authorship is appropriated. This example well reflects the different content of the concepts; therefore, they should not be used as synonyms.

6 Since a voluntary mutual agreement is beneficial to both parties, we essentially no longer have a victim whose copyright would be violated, and the dangerousness of this act in the doctrine is precisely defined by the harm to the victim, so by eliminating this element, the act is no longer dangerous in a criminal legal sense.

7 It is noteworthy that in the previous version of the norm, which was in force until 2019, liability was provided for the illegal purchase, sale and submission of final theses to scientific and educational institutions. This meant that the victim himself/herself agrees with such a violation by selling the work, which eliminates the harm (dangerousness) of the act. Furthermore, in the current version of Article 123(1), there is no longer an act of purchase, there is only the submission of someone else's scientific work to a scientific institution in his/her own name.

4 search keywords in 'Infolex' and 'Liteko.teismai'. The search engines returned a total of 24 unique case numbers. After manually grouping case numbers based on their court case number and content, and removing duplicate cases, it appears that the databases collectively provided 18 distinct case scenarios, which, following a content analysis, were flagged as either related to or unrelated to misappropriation of authorship:

- 18 case numbers were identified using the keyword 'plagiarism', corresponding to 12 distinct case scenarios, of which 7 actual scenarios are related to misappropriation of authorship;
- under the keywords 'misappropriation of authorship' – 4 case numbers (4 actual cases), of which 2 actual cases are related to misappropriation of authorship;
- based on the keywords 'misappropriated authorship' – 1 case number (1 factual situation), which is not related to misappropriation of authorship;
- by the keywords 'Article 191' – 4 case numbers (4 factual situations), none of which are related to misappropriation of authorship.

When combining the relevant situations presented for all keywords, it is evident that there were actually only 6 administrative cases (factual situations) involving misappropriation of authorship (see *Table 2* below).

Table 2. Volume of case law in administrative cases by keywords

		Keywords (administrative cases)			
		'Plagiarism'	**'Misappropriation of authorship'**	**'Misappropriated authorship'**	**'Article 191'**
Results	Number of results	18	4	1	4
	Number of unrelated results	7	2	1	4
	Number of related results	11	2	0	0

		Keywords (administrative cases)			
		'Plagiarism'	**'Misappropriation of authorship'**	**'Misappropriated authorship'**	**'Article 191'**
Factual situations	Number of situations	11	4	1	4
	Number of unrelated situations	5	2	1	4
	Number of related situations	6	2	0	0
Total number of different factual situations		6			

Compiled by author R. Žiedė

It should be noted that all of the administrative cases identified are related to the activities of the Ombudsman for Academic Ethics and Procedures of the Republic of Lithuania (hereinafter – the OAEP) in investigating violations of academic ethics, during which instances of plagiarism were identified. Plagiarism is a narrower form of misappropriation of authorship, and the OAEP also investigates only those cases of plagiarism that are related to academic institutions and the academic activities of their members. Therefore, the number of administrative cases cannot adequately reflect the situation of misappropriation of authorship in Lithuania due to the narrow scope of the investigations.

Table 3 below presents data on investigations of administrative offences conducted by the OAEP Service pursuant to Article 123 of the CAO since the enactment of this article in 2017.

Table 3. Investigations of administrative offences conducted by the OAEP Service pursuant to Article 123 of the CAO

	2017	2018	2019	2020	2021	2022	2023	2024
Number of investigations conducted	0	- no data	1	3	2	2	1	1

Compiled by the author, R. Žiedė, based on the annual reports of the Office of the Ombudsman for Academic Ethics and Procedures for 2017–2024

Even the small number of investigations presented in this table is not very accurate or indicative of the prevalence of misappropriation of authorship, as several reports note that investigations initiated in previous years are ongoing, and in some cases, the number of penalties imposed does not match the number of investigations, etc. Regardless of the details, it is evident that there are also very few investigations into administrative offences under Article 123 of the CAO, barely a few per year.

To summarise what has been stated in this section, it is evident that Article 122 of the CAO does not apply in cases of misappropriation of authorship and Article 123(1) of the CAO applies in cases of 'misappropriation' of authorship, but only in the narrow cases defined in this provision. Civil liability in the cases provided for in Article 123(1) of the CAO may not arise, since the author's rights are 'infringed' with the author's knowledge and consent.

4. Criminal Liability

Currently, criminal liability for misappropriation of authorship is established in Article 191 of the CC of the Republic of Lithuania:

Article 191. Misappropriation of Authorship

1. *A person who publishes or publicly discloses another person's work (including computer programs) or a part thereof under their own name shall be punished by community service, a fine, restriction of liberty, arrest, or imprisonment for up to two years.*
2. *A person who, by taking advantage of a position of authority or by using psychological coercion, compels the author of a work (including computer*

programs) or a part thereof to recognise another person as a co-author or successor to the author's rights, or to renounce the right of authorship, shall be punished by community service, a fine, restriction of liberty, arrest, or imprisonment for up to three years.

3. *A legal entity shall also be liable for the acts provided for in this article.*

In this provision, the subject matter of the offence is defined as *another person's work (including computer programs) or a part thereof*. The wording of Article 191(1) of the CC is blanket in nature, requiring that the content of the subject matter of misappropriation of authorship be sought, as mentioned above, in the LCRR. The latter does not provide the closed list of copyright-protected works, but it does provide an illustrative list of such works and sets out the criteria on the basis of which any result of intellectual activity may be recognised as a work. It is precisely these two criteria – originality and the expression of the work in some objective (perceivable to others) form – that are decisive in recognising the result of intellectual activity as a subject matter of copyright infringement.

It can be noted, that until the most recent amendments to Article 191 of the CC, the basic provision listed specific types of works as the subject of misappropriation of authorship – literary, scientific, and artistic works (including computer programs and databases) or parts thereof – fully corresponded to the object of copyright protection established by the LCRR. By removing the categories of works from the provision and retaining the minimalist wording 'work', with the addition of 'including computer programs' in the parentheses, the substance of the provision has essentially remained unchanged; however, such amendments cannot be considered successful: computer programs are listed in the LCRR as a type of literary work, whereas the removal of databases from the provision raises more questions regarding their status as objects of copyright protection. The provision must be formulated in such a way as to ensure the principle of the rule of law emphasised in the jurisprudence of the Constitutional Court, which includes the requirement of legal clarity, enabling parties to legal relationships to align their conduct with the requirements of legal acts, and for those applying the law to properly interpret the content of the provision as protecting authors' rights to any type of work, but not the objects of related rights or industrial property rights. There are several equivalent ways to formulate the provision properly.

It would be best to refine the wording of the subject matter of the offence in the provisions of Article 191(1) and (2) of the CC by using the term 'subject

matter of copyright', without listing specific types of works or providing detailed parenthetical explanations, thus avoiding any doubt. In a criminal case, when assessing whether a particular result of intellectual activity can be considered the subject matter of copyright (the object of the crime), it is not the type of work that is of essential importance, but rather the originality of that result of intellectual activity as the fundamental criterion for the legal protection of the work. The fact that the subject matter of Article 191 of the currently applicable CC does not cover the misappropriation of authorship of an object of related rights or an object of industrial property should be viewed favourably, given the legislature's considerable discretion regarding the scope of this criminal provision.

It should be noted that Article 191 of the CC protects both the entire work and a part thereof. A part of a work, as the subject matter of misappropriation of authorship, has been protected under criminal law only since the amendments to Article 191 of the CC in 2000.[8] Thus, criminal liability for the misappropriation of authorship of a part of a work is currently equivalent to the liability arising from the misappropriation of the entire work. This raises a problematic question: is this truly a reasonable and proportionate legal regulation in accordance with the principle of *ultima ratio*, and should the provision be narrowed to apply only to the entire work, rather than to individual parts? The answer depends on exactly which part has been appropriated and what is generally considered a part of the work. First and foremost, it should be noted that Article 191 of the CC applies only to the results of intellectual activity that are subject to copyright protection. This means that the 'part of the work' that is misappropriated must also be protected by copyright and constitute the subject matter of copyright, that is an original result of creative activity expressed in an objective form. Therefore, in answering the question of whether it is proportionate to apply criminal liability to cases where only a part of a work is misappropriated, it should be noted that 'a part' of a work protected by criminal law and the LCRR is nothing other than a full-fledged, independent work, to which legal protection is applied on an entirely equal footing with the work of which it is a part of.

According to the current wording of Article 191(1) of the CC, the objective element of misappropriation of authorship manifests itself in two alternative acts:

1. publishing another person's work under one's own name, or
2. communicating to the public another person's work under one's own name.

---

8 The Parliament of the Republic of Lithuania. Law Amending Articles 35, 142, 308, 321(2) of the Criminal Code of the Republic of Lithuania and Supplementing the Code with Articles 142(1), 142(2), 142(3), no. VIII-1646, April 20, 2000.

With regard to the concepts of 'publication' and 'communicating to the public', they should be interpreted as defined in Article 2, paragraphs 17 and 55, of the LCRR: *Publication – the production of a sufficient number of copies of a work, an object of related rights, or an object of sui generis rights to satisfy reasonable public demand, regardless of the method of production, provided that the work, or the object of related rights or sui generis rights, has been made publicly available with the authorisation of the holders of such rights*[9] (Article 2(17) of the LCRR). Meanwhile, *Public communication – the public transmission of a work by wire or wireless means, including making it publicly available in such a way that members of the public may access it from a place and at a time individually chosen by them. <...>*[10] (Article 2(55) of the LCRR). Both of these rights are considered part of the system of the author's economic rights, as established in Article 15(1) of the LCRR. However, the description of the act in Article 191(1) of the CC, which refers only to the exercise of two economic rights – publication and public communication – is too narrow in scope and must be expanded by including at least the acts of public display and public performance in the scope of the offense, since the current wording unreasonably restricts the protection of copyright if the act involves the misappropriation of another's work in other ways specified in the LCRR. However, including all the acts listed in Article 15 of the LCRR in the scope of the provision is risky: an overly broad definition of the act could have a negative effect, that is the non-application of the provision based on the principle of *ultima ratio*.

It should be noted that recent case law already provides examples where criminal proceedings for misappropriation of authorship have been discontinued based on a single argument – the *ultima ratio* principle (e.g., the Supreme Court of Lithuania's ruling of April 9, 2024, in criminal case No. 2K-79-976/2024). The court dismissed the case exclusively based on the *ultima ratio* principle, arguing that *the case does not involve a claim for compensation for pecuniary damage, and it has not been established that the academic dishonesty was related to unjust enrichment at the expense of another person's legitimate interests or other self-serving purposes, it is determined that, in the present case, holding A. K. criminally liable for misappropriation of authorship would*

9 Publishing a work is one of the forms of reproduction of a work, therefore we will not find such an independent right in either international legal acts or EU directives. For more information – see Ramūnas Birštonas et al., *Intelektinės nuosavybės teisė*, 132.

10 The part removed from the quote refers to the public disclosure of the object of related rights, because it is not relevant to the analysis of the topic – the appropriation of authorship does not infringe the objects of related rights.

violate the principle of criminal law as the ultima ratio (last resort). Therefore, the criminal case is dismissed (Article 3(1)(1) of the Code of Criminal Procedure). Pursuant to Article 115(3)(2) of the Code of Criminal Procedure, the civil claim shall be left unexamined. Theoretically, the court indeed has the option to apply this principle. However, this was not the case here as the court relied on the absence of elements not specified in Article 191 of the CC as grounds for negating the dangerous nature of the act as it sought evidence of financial loss, unjust enrichment (in other words, consequences), as well as selfish motives (which are also linked to financial gain). According to O. Fedosiuk, *in judicial practice, the ultima ratio principle may be applied both when considering issues of the applicable penalty and when distinguishing criminal liability from other types of legal liability, as well* ***as when interpreting the content of definitions of criminal acts that lack specificity***[11] (marked bold by the authors of the article). It may be assumed that, from this perspective, the court interpreted the latter aspect (as marked bold in the quote) – the content of definitions of criminal offences lacking specificity. Yet the constituent elements (*corpus delicti*) of misappropriation of authorship in Article 191 of the CC are described in concrete terms, without explicitly establishing the consequences, the content of which could be expanded and interpreted, as the court did in this case. Article 191 of the CC does not establish any additional elements required to classify the act as misappropriation of authorship crime – neither consequences, nor intent, motive, nor any others. It *rightly* does not and *has never* included financial consequences (such as financial gain or significant financial loss), as these are generally not characteristic of misappropriation of authorship and do not reflect the provision's purpose of protecting the moral right of authorship. Therefore, in the authors' opinion, such an interpretation by the court – which requires the existence of damage (consequence), a factor that is not (and should not be) established as an element of the offence under Article 191 of the CC – is legally flawed, since all elements of the criminal offence were established in the case. The act (*actus reus*) in this particular case was not trivial; it was committed intentionally by several persons. Furthermore, there is an analogous case law in which individuals were convicted for similar misappropriation of authorship (Supreme Court of Lithuania ruling of May 13, 2014, in criminal case No. 2K-253/2014). The situation might have been assessed differently if the court had relied on other arguments, for example, by drawing parallels with

11 Oleg Fedosiuk, "Baudžiamoji atsakomybė kaip kraštutinė priemonė (*ultima ratio*): teorija ir realybė," *Jurisprudencija* 19, no. 2 (2012): 735.

administrative liability, especially given that in this specific case, administrative proceedings were also underway regarding an unfavourable decision issued by the Office of the OAEP concerning established plagiarism against the same defendants. Instead, the court undertook to alter the elements of the criminal offence unreasonably, thereby effectively negating the rationale and purpose of Article 191 of the CC as enshrined in the Code.

From this and other similar examples, a certain trend can be discerned in which, based on the principle of *ultima ratio*, one extreme shifts to another – refusing to defend violated constitutional values against harmful or dangerous encroachments, viewing this as an unjustified restriction of the offender's rights, and regarding criminal liability as excessive.

The authors of this article agree with Ieva Žentelytė, who comments on the courts' authority to amend the content of criminal provisions – and, consequently, the scope of criminal liability – by applying the principle of *ultima ratio*: *The criminalisation or decriminalisation of criminal acts by introducing or removing elements of the offence is the exclusive prerogative of the legislature. The interpretation and application of this principle when new elements of a criminal offence arise that are not established in criminal law is too broad and violates the constitutional principle of the separation of powers*.[12]

In this case, one may rely on the clarification formulated by the Supreme Court of Lithuania: *It should be noted that in judicial practice, the idea of criminal liability as a measure of last resort (ultima ratio) is associated with the artificial criminalisation of acts and the unjustified expansion of criminal liability. Thus, the improper application of criminal law in practice, distorting its principles and purpose, does not always mean that the law providing for criminal liability for a criminal act is in itself inappropriate (ineffective) and must therefore be repealed, and the criminal act – decriminalised*" (Proposal by the Supreme Court of Lithuania to the Committee on Legal Affairs and Law Enforcement of the Parliament of the Republic of Lithuania in Conclusion No. 102-P-14 of April 15, 2015). Thus, the fact that an unlawful and unjust decision was rendered in the case due to the improper application of the *ultima ratio* principle should not negate the fact that the criminalised act under Article 191 of the CC is consistent with the essence of the *ultima ratio* principle. It should be noted that if all elements of the offence are established, but at the same time the degree of harm of the act is low, the institution of exemption from criminal liability provided for

[12] Žentelytė, Ieva. "Ultima ratio: ar neperžengta riba?" *Mokslinės minties šventė* (2013): 59. Accessed May 14, 2026, https://cris.mruni.eu/server/api/core/bitstreams/3f968753-4bd3-47af-8ff5-2415c0c729ed/content.

in the Article 37 of the CC, which establishes exemption from criminal liability due to the insignificance of the criminal act, should be used.

When searching court practice in criminal cases from January 1, 2005, to December 31, 2024, including district court rulings, using all 4 search keywords in the 'Infolex' and 'Liteko.teismai' the courts' search systems yielded a total of 81 unique case numbers (see *Table 4* below). After manually consolidating the case numbers based on the judicial proceeding number and content, and removing duplicate cases, it is evident that there are 68 distinct cases, which, following an analysis of their content, were marked as either related or unrelated to copyright infringement:

- 8 case numbers were identified under the keyword 'plagiarism', corresponding to 6 distinct factual situations; of these, 2 factual situations are related to misappropriation of authorship;
- Under the keywords 'misappropriation of authorship – 12 case numbers (10 factual situations), of which 4 factual situations are related to misappropriation of authorship;
- based on the keywords 'misappropriated authorship' – 25 case numbers (20 actual cases), of which 4 involved actual instances of misappropriation of authorship;
- by the keywords 'Article 191' – 61 case numbers (51 actual cases), of which 5 involved actual cases of misappropriation of authorship.

Table 4. Volume of case law in criminal cases by keywords

		Keywords (criminal cases)			
		'Plagiarism'	**'Misappropriation of authorship'**	**'Misappropriated authorship'**	**'Article 191'**
Results	Number of results	8	12	25	61
	Number of unrelated results	6	7	17	46
	Number of related results	2	5	8	15

		Keywords (criminal cases)			
		'Plagiarism'	**'Misappropriation of authorship'**	**'Misappropriated authorship'**	**'Article 191'**
Factual situations	Number of situations	6	10	20	51
	Number of unrelated situations	4	6	16	46
	Number of related situations	2	4	4	5
Total number of different factual situations		5			

Compiled by author R. Žiedė

Several cases were submitted multiple times under different keywords; therefore, the total number of related cases across the four keywords is higher than the actual number of cases. Consequently, the summary result of this search is five distinct factual situations in criminal cases. After the authors of this article noticed discrepancies between publicly available statistics on judicial proceedings in courts of first instance and the number of criminal cases found, an additional inquiry was submitted to the National Court Administration, which provided an explanation for the discrepancy and several additional rulings in criminal cases. Combining these five factual situations and evaluating the cases sent by the National Court Administration, it is evident that, in reality, there were only 6 criminal cases (factual situations) of misappropriation of authorship during the sample period.

Summarising the statistics for all three types of legal liability examined, combining the results provided by all search engines, and grouping publicly available cases according to the identical factual situations examined, it can be concluded that, during the period under analysis, court practice involved the examination of 6 factual situations under criminal procedure, 6 situations under administrative procedure, and 16 situations under civil procedure, with some of these factual situations being resolved simultaneously in several different proceedings.

Although the methodology chosen for the study of judicial practice does not provide an indisputably complete picture of the prevalence of registered misappropriation of authorship (due to the small number of search keywords used, their possible phrasing, potential errors in the case classification system, etc.), it is nevertheless possible to identify general trends in cases of this nature:

1. There are relatively few cases on misappropriation of authorship of all types; these are issues rarely solved in court.
2. The majority of cases are civil cases, followed by administrative cases, with the fewest being criminal cases. This 'pyramid' is natural and logical, reflecting the relationship between criminal, administrative, and civil law. However, the distribution of cases is related not only to aspects of legal regulation in different branches of law, but also to the choice made by individuals who have suffered from misappropriation of authorship to resolve the situation in one way or another. It should be noted that in more than one instance, individuals have pursued both criminal and civil proceedings, and in several cases, administrative proceedings as well, within the same case (factual situation).
3. An analysis of all the circumstances of cases across different categories reveals that there is no correlation between the severity of the misappropriation of authorship and the type of legal proceedings chosen. Whether the case is heard in civil, administrative, or criminal proceedings essentially depends on the victim's own choice regarding the method of defending their rights, rather than on the circumstances of the case. It is evident that there are criminal cases of moderate-severity misappropriation of authorship, as well as high-severity cases, which were defended against and resolved only through civil proceedings.

5. The Competition Between Civil, Administrative, and Criminal Liability

When discussing the relationship between civil and criminal liability, one might ask whether the misappropriation of authorship should be criminalised at all. It could be argued that, in theory, an author could seek compensation privately and defend their moral rights through civil proceedings. However, the latter option is not always available: when the perpetrator uses a pseudonym rather than their real name to claim authorship, such a defence would be practically very

difficult, since filing a lawsuit requires a significant amount of information about the person being sued. Furthermore, it is very easy to commit misappropriation of authorship remotely, by people unknown to the victim, also by foreigners, or without the victim becoming aware of the infringement for a long time, which leads to the problems regarding filing a lawsuit – it is simply too complicated or impossible for victims to do so, causing them to opt for a passive approach and not defend their violated rights. An analysis of case statistics shows that in most cases, the perpetrator and the victim (or the plaintiff and the defendant) were linked by certain mutual relationships that had developed prior to the commission of the act (e.g., former co-authors,[13] teacher-student relationships,[14] client-contractor relationship[15]), but there are also cases where the parties to the case had absolutely no relationship whatsoever and were strangers to one another,[16] often competitors in the same field of activity.[17] If they have no relationship with one another – or, even more so, if they reside in different countries – the author essentially has no means of defending himself in civil proceedings.

When authors give up defending their rights, each such decision ultimately fosters an undesirable climate of tolerance for violations, which may eventually

---

13 In criminal cases, see Kaunas Regional Court, case no. 1A-110-954/2023, September 4, 2023; Kaunas Regional Court, case no. 1A-316-579/2020, June 17, 2020. In administrative cases, see Vilnius Regional Administrative Court, case no. eI3-440-561/2022, May 25, 2022; Vilnius Regional Administrative Court, case no. I-2273-244/2018, September 11, 2018.

14 See rulings in criminal cases: Supreme Court of Lithuania, case no. 2K-253/2014, May 13, 2014; Vilnius Regional Court, case no. 1S-137-51/2009, March 10, 2009; in administrative cases: Supreme Administrative Court of Lithuania, case no. eA-651-463/2023, September 20,2023; Supreme Administrative Court of Lithuania, case no. eA-689-525/2023, October 18, 2023; Vilnius Regional Administrative Court, case no. eI-7418-629/2015, November 9, 2015.

15 See the decision of the Vilnius Regional Administrative Court in administrative case no. I-1015-244/2019,March 27, 2019; as well as rulings in civil cases: the decision of the Lithuanian Court of Appeal, case no. 2A-111, April 7, 2003; Lithuanian Court of Appeal, case no. e2A-18-934/2023, January 26, 2023; Klaipėda Regional Court, case no. 2-194-826/2017, March 21, 2017.

16 See the ruling of Kaunas Regional Court in criminal case no. 1A-363-81-2010, November 3, 2010; as well as rulings in civil cases: Supreme Court of Lithuania, case no. 3K-3-515, May 8, 2000; Lithuanian Court of Appeal, case no. 2A-275, September 5, 2005; Lithuanian Court of Appeal, case no. 2A-61/2013, April 11, 2013; Lithuanian Court of Appeal, case no. 2A-499/2013, July 3, 2013; Klaipėda Regional Court, case no. e2A-590-1092/2024, June 13, 2024; Vilnius Regional Court, case no. e2-1306-881/2017, January 18, 2017.

17 See resolutions in civil cases: Lithuanian Court of Appeal case no. 2A-733/2013, October 21, 2013; Lithuanian Court of Appeal, case no. 2A-1082/2013, December 5, 2013. Lithuanian Court of Appeal, case no. 2A-230-823/2018, April 27, 2018; Kaunas Regional Court, case no. 2-1370-390/2015, December 9, 2015; Vilnius Regional Court, case no. 2A-731-881/2016, November 29, 2016.

turn against society itself. Thus, decriminalising the misappropriation of authorship would send precisely such an unfavourable message to society. If, however, the victim knows the perpetrator and their personal details (an analysis of court practice shows this is the case in more than half of all instances), it will likely be more time-efficient to file a civil claim. However, the victim must have the opportunity to seek assistance from the state to protect their interests as an author, since the state itself and society as a whole have an interest in protecting authors, encouraging them to continue engaging in creative activities that drive the development of culture, the economy, social capital, and more. Thus, civil and criminal liability complement each other, and it would be entirely inappropriate to dispense with either of them.

With regard to the relationship between criminal and administrative liability, the overlap between Article 191(1) of the CC and Article 123(1) of the CAO is narrow in scope, the latter being narrower, and may raise certain issues of consistency. Based on the principles of relationship between these forms of liability, the situation should be the opposite – the CAO should contain a general provision on misappropriation of authorship and, in contrast, the CC should contain a special provision characterised by features that increase the harm (danger) of the act. An abstract assessment of the relationship between the provisions of the CC and the CAO reveals that Article 191 of the CC currently establishes a much more general provision on misappropriation of authorship than the CAO: the misappropriation of authorship of scientific works in an academic setting is considered an administrative offense, while in any other setting or regarding any other work, it is considered a crime, even though their harm may be the same or differ only very slightly. However, it should be noted that the CAO uses the term 'scientific or academic work' rather than 'scientific work', which theoretically could be any type of work established by the LCRR (including works of art, literature, or science, as well as any other type), provided that such a work is submitted to an academic or research institution (i.e., is included in the curriculum). Therefore, it cannot be said that the types of protected works differ, nor should they – the application of criminal and/or administrative liability cannot depend solely on the type of work, since all works must be protected equally and there is no distinction between them in the LCRR.

It is debatable whether different spheres of use of a work can give rise to different levels of liability, but there are arguments supporting this need. First, most instances of misappropriation of authorship occur in academic and educational institutions, which is why effective measures are needed to address such violations. Second, such acts are typically committed by young

people (schoolchildren or students), for whom imposing criminal liability for academic fraud would be disproportionate and even harmful. Third, the imposition of administrative sanctions is a significantly faster process than the application of criminal liability, which allows for a response not only more quickly but also to a greater number of misappropriation of authorship cases (at least in theory), thus ensuring greater inevitability of liability, which should more effectively serve a preventive function (a person will not plagiarise or purchase another person's work if they know there is a very high probability that they will be punished for it, regardless of the penalty). Fourth, the LCRR itself contains a fourth section, 'Limitations on Economic Rights', which establishes provisions allowing, *inter alia*, the use of works for educational and research purposes without the copyright holder's permission, i.e., within the academic environment itself.[18] If the scope of copyright protection varies across different spheres of activity, it is reasonable to have different legal liabilities for unlawful acts within them.

Thus, although administrative liability for a certain narrow range of acts of copyright infringement is justified, it is clear that in all other cases we have a transition from a civil delict under the LCRR to a violation of the CC, without an 'intermediate step' of the CAO, where it is defined for very narrow cases, as provided for in Article 123 of the CAO.

To ensure greater consistency and a certain 'gradation' system between the CC and the CAO, the creation of a new article in the CAO establishing liability for less dangerous acts of misappropriation of authorship should be considered. However, when considering what such a provision in the CAO should look like and how to assess different instances of misappropriation of authorship based on the degree of danger, it becomes clear that doing so is very difficult, if not impossible. As A. Dambrauskienė notes, *a criminal offense and an administrative offense are distinguished based on a quantitative criterion of the degree of danger, which is characterised by the totality of objective and subjective elements of the specific act (most often – the subject, the nature of the act, the consequences, etc.), and, based on the German legal tradition, according to a qualitative criterion – the category of moral reprehensibility.*[19] Misappropriation of authorship is reasonably defined by its formal elements, as it lacks the consequences whose degree of danger would normally allow the

18 Article 21 "Citation", Article 22 "Use of the work for teaching and research purposes," Article 22[1] "Text and data mining for research purposes."

19 Aušra Dambrauskienė, "Implementation of the Ultima Ratio Principle in Criminalizing Acts in the Criminal Code of the Republic of Lithuania," (PhD diss., Vilnius University, 2017), 366.

same acts to be classified into categories of differing danger (harm). One possible solution would be to establish the evaluative criterion of 'causing significant harm' in Article 191 of the CC, requiring the court to assess the extent of non-pecuniary harm resulting from the misappropriation of authorship. However, in the authors' opinion, establishing such an evaluative criterion in cases of misappropriation of authorship should be avoided, since both the victim and the judge will evaluate the non-pecuniary harm differently. Therefore, this would not help distinguish between types of liability, as victims can already freely choose between civil or criminal proceedings depending on the degree of their grievance, and establishing this criterion would not change that.

Another option is to establish criteria reflecting the subjective aspect in Article 191 of the CC. However, it seems that financially selfish motives or commercial interests are not typical of the act of misappropriation. In contrast, authorship is often misappropriated to exploit human capital for the sake of recognition, and direct financial gain is usually not a result of misappropriation of authorship. If the element 'for commercial purpose' is established, its content should be interpreted pursuant to Article 2(29) of the LCRR: *Commercial purposes — purposes aimed at obtaining direct or indirect economic or commercial advantage; they generally do not encompass activities carried out in good faith by end consumers*. The pursuit of indirect economic or commercial benefit would allow linking misappropriation of authorship to subsequent consequences caused by it, where the perpetrator seeks those benefits at the time of committing the misappropriation. This would encompass certain cases of acquiring social capital that can be monetised (for example, an anticipated change in career or salary resulting from misappropriation of authorship, the scale of advertising determined by the number of followers, etc.). For that reason, this element can serve as an appropriate means to distinguish between criminal and administrative liability.

Nevertheless, it is difficult to determine the actual motives driving persons to appropriate other's authorship without further research, since the practice of courts or pre-trial investigations is insufficient to support such a conclusion. Once these motives are identified, a new provision in the CAO entitled 'Misappropriation of authorship' could be drafted without these subjective elements, making it a general norm, while Article 191 of the CC – containing those subjective elements – would operate as the special norm. In other words, there would be no need to amend Article 123 of the CAO, since it currently fulfils its purpose appropriately, given its present scope and the objective of its enactment.

Where legal or other measures responding to misappropriation of authorship are lacking or insufficient, criminal law applies, and the harm (dangerousness) of the act in any given factual situation can only be assessed at the stage of implementation of criminal liability. The principle of *ultima ratio* would also compel the legislator to seek alternative measures to address cases of authorship misappropriation by means other than criminal law, particularly given the high degree of latency associated with this offence, as evidenced in part by various plagiarism studies.[20] The aim of such regulation should be to make responses to violations as frequent as possible but as mild as possible (of course, taking into account the severity of the breach), thereby ensuring the effectiveness of the protective norm. In certain spheres this has already been achieved – in academia misappropriations of authorship can be addressed by all available means: by imposing disciplinary sanctions on staff or other non-disciplinary measures on students, by initiating an administrative procedure under Article 123 of the CAO with the assistance of the OAEP, by bringing a civil claim, or by referring the matter to a pre-trial investigation authority under Article 191 of the CC in accordance with the Code of Criminal Procedure. Although such regulation raises issues of norm overlap, the wide range of available remedies is to be welcomed.

---

20 The prevalence of the act can be estimated not only based on criminal statistics, but also from other sources. There are a number of plagiarism checking systems or unofficial plagiarism statistics calculated by them available in the public domain, and even real-time statistics of plagiarism in percentages for countries around the world are provided (e.g. see Plagiarism Checker X, "Global Plagiarism Live Statistics," accessed April 20, 2026, https://plagiarismcheckerx.com/global-plagiarism-live-stats?AFFILIATE=99715&__c=1). These data usually indicate large scales of plagiarism, and different sources indicate very different plagiarism percentages (cf. e.g. both 7 per cent and 40 per cent and much more, depending on what is included in the content of the concept of plagiarism, how questions are asked about individual acts of plagiarism, etc.; see e.g. Plagiarism.org, "Plagiarism: Facts & Stats," Jun 7, 2017, https://www.plagiarism.org/article/plagiarism-facts-and-stats). However, one should not be too quick to trust such data, as plagiarism detection systems often detect not plagiarism, but overlap with existing written works, i.e. they also include correctly marked citations in the plagiarism percentage. Therefore, more reliable information about the extent of plagiarism is provided by surveys in academic institutions, which show high levels of plagiarism (e.g., see Donald L. McCabe, Linda Klebe Treviño and Kenneth D. Butterfield, "Cheating in Academic Institutions: A Decade of Research," *Ethics & Behavior* 11, no. 3 (2001): 219–232, https://doi.org/10.1207/S15327019EB1103_2. The high potential latency of authorship misappropriations in the academic field is also shown by the study "Co-authorship: Aspects of Professors' Publications" conducted in Lithuania in 2019 by the Office of the Academic Ethics Controller (see Gintarė Židonė, Kamilė Kapočiūtė and Regimantas Juras, *Bendraautorystė: profesorių publikavimosi aspektai. Tyrimo ataskaita*, Akademinės etikos ir procedūrų kontrolieriaus tarnyba, 2019, accessed April 20, 2026, https://etikostarnyba.lt/wp-content/uploads/2019/11/Tyrimo-ataskaita_final.pdf).

Similar systems, like these achieved in academic field, are needed in other fields of authorship misappropriation, in cases, where even the mildest criminal sanctions would be disproportionate to the act, but no other option is available, except for civil liability: victims should have the option to turn to an institution that can help resolve the dispute outside court, where the infringement occurred in a non-academic sphere. To date, this function is partially performed by the Lithuanian Copyright Collective Management Association LATGA, but only for persons with whom it has contractual arrangements; moreover, LATGA's ability to settle the dispute is limited by the legal framework governing available remedies – it cannot itself resolve the dispute.[21]

If criminal legal protection for authorship were abandoned, leaving only administrative or civil liability, various adverse consequences could arise. Criminal legal protection is sometimes necessary because its existence is simply just, and abandoning such norms would be plainly unjust. The high immorality of the conduct is also regarded as a criterion for criminalisation.[22]

---

21 A similar problem exists in the protection of intellectual property rights at the national level in general. As Beatričė Ceizarienė and Elena Ruikytė point out, *Currently, there are as many as six ministries operating and forming policy in the field of IP protection in Lithuania <...>: the Ministry of Economy of the Republic of Lithuania – responsible for promoting innovation in Lithuania; the Ministry of Culture – responsible for copyright protection; the Ministry of Education, Science and Sport – oversees the field of higher education and general education; the Ministry of Justice – forms industrial property policy; the Ministry of Foreign Affairs – coordinates intellectual property aspects in the field of international trade; the Ministry of Agriculture – responsible for geographical indications of agricultural products and legal protection of plant varieties. Each institution also carries out public education and information dissemination activities separately. With so many ministries operating, not only are human resources fragmented, but public education and information dissemination activities are also fragmented, with target audiences and information content fragmented. In order to achieve an effective IP protection system and coordinated activities, on June 17, 2020, at the proposal of TM, the Government established the Intellectual Property Protection Coordination Commission, whose 'main task is to coordinate the activities of institutions responsible for individual areas and to form state policy on this issue'*. (Beatričė Ceizarienė and Elena Ruikytė, "Legalaus skaitmeninio turinio vartojimo ir antipiratavimo skatinimas. Esamos situacijos analizė," (LR kultūros ministerija, Kurk Lietuvai, 2023), accessed April 20, 2026, https://data.kurklt.lt/wp-content/uploads/2023/04/Esamos-situacijos-analize.pdf. The establishment of a similar institution to deal with copyright infringements could be a solution that would reduce the application of strict liability for misappropriation of authorship. LATGA could not become an entity applying administrative liability under a possible new article on misappropriation of authorship of the CAO, since only officials of state institutions initiate administrative offence proceedings, conduct investigations and draw up administrative offence protocols (Article 589 of the CAO), and LATGA is a non-profit non-governmental organisation.

22 William Bülow and Gert Helgesson, "Criminalization of Scientific Misconduct," *Medicine, Health Care and Philosophy*, 22, (2019): 245–252, https://doi.org/10.1007/s11019-018-9865-7; Antony

It can also be noted that the criminal offence of misappropriation of authorship has existed almost since the inception of legal protection for authors, which supports its necessity by reference to the continuity and effectiveness of the norm. The success of legal norms (including the norm on misappropriation of authorship) and the patterns of behaviour chosen by individuals in society can be evidenced by longstanding practices that have produced benefits or caused certain negative effects. The persistence of the criminal offence of misappropriation of authorship in the law for many years was maintained because its existence ensured smoother social relations in the sphere of creativity and the cultivation of culture, compared with a situation in which such a norm was absent.

6. Conclusions

1. Lithuania provides broad protection of moral authorship right through civil law. Accordingly, any misappropriation of authorship (including cases where the perpetrator's fault cannot be established) would be regarded as a civil law infringement and subject to civil remedies. Civil liability for misappropriation of authorship and other civil remedies applicable in such cases are a necessary and irreplaceable part of protection against misappropriation of authorship. However, they are not sufficient on their own, since structural weaknesses in civil enforcement would leave a large number of misappropriation cases without legal redress for victims and would also harm public interests. Therefore, civil liability and other civil remedies for misappropriation of authorship must be supplemented by public-law measures: administrative and/or criminal liability. As these types of liability can be applied alongside (or in parallel with) each other, no problem of separation of spheres arises.
2. The misappropriation of authorship by submitting another person's academic or study work to an educational or research institution is an administrative offence. In contrast, misappropriation of any other work in any other context may constitute a criminal offence. The provision in the CC is worded far more broadly than that in the CAO, although, according

Duff and Tatjana Hörnle, "Principles of Criminalisation," in Kai Ambos, Antony Duff, Alexander Heinze, Julian Roberts, Thomas Weigend, eds, *Core Concepts in Criminal Law and Criminal Justice*, *Vol. III* (Cambridge University Press, 2025): 13–54.

to the general logic and relationship between the two codes, the opposite would be expected.

3. Article 191(1) of the CC is at once too narrow (being limited to two ways of use) and too broad (because it contains no other qualifying features beyond those two ways of use): the description of the conduct in Article 191(1) by reference only to the two activities, that is, publication and public communication, is unduly narrow and ought to be expanded, in order to include any other form of public use, which was used to misappropriate authorship. However, practice shows that an overly broad formulation leads to non-application of the provision using *ultima ratio* principle. Therefore, it should be drafted more precisely by defining the objective side of the crime to include only acts of public display and public performance.
4. The present scope of application of the CC and the CAO is inconsistent and requires adjustment: Article 123(1) of the CAO covers only a narrow range of misappropriations within academic activity, so currently there is no universal possibility to hold persons administratively liable for all lower-harm misappropriations, while prosecute criminally only for the most dangerous cases. It is possible to create a coherent gradation between criminal and administrative liability by introducing additional subjective elements into Article 191 of the CC (for example, commercial purposes or selfish motives), but these must be selected on the basis of an assessment of the common motives for committing misappropriation of authorship. Existing court and pre-trial investigation practices are insufficient for that purpose; only a latent crime investigation could reveal true motives and intents of the perpetrators.

References

Scientific publications

Birštonas, Ramūnas, Danguolė Klimkevičiūtė, Nijolė Janina Matulevičienė, Lina Mickienė, and Jūratė Usonienė. *Intelektinės nuosavybės teisė*. Registrų centras, 2010.

Birštonas, Ramūnas, Jūratė Liauksminaitė, and Vytautas Mizaras. *Lietuvos Respublikos autorių teisių ir gretutinių teisių įstatymo komentaras*. Vilniaus universiteto leidykla, 2024.

Bülow, William, and Gert Helgesson. “Criminalization of Scientific Misconduct.” *Medicine, Health Care and Philosophy* 22 (2019): 245–252. https://doi.org/10.1007/s11019-018-9865-7.

Dambrauskienė, Aušra. “Implementation of the Ultima Ratio Principle in Criminalising Acts in the Criminal Code of the Republic of Lithuania.” PhD diss., Vilnius University, 2017.

Duff, Antony, and Tatjana Hörnle. “Principles of Criminalisation.” In Kai Ambos, Antony Duff, Alexander Heinze, Julian Roberts, Thomas Weigend, eds. *Core Concepts in Criminal Law and Criminal Justice*, *Vol. III*. Cambridge University Press, 2025. https://doi.org/10.1017/9781009038126.002.

Fedosiuk, Oleg. “Baudžiamoji atsakomybė kaip kraštutinė priemonė (*ultima ratio*): teorija ir realybė.” *Jurisprudencija* 19, no. 2 (2012): 715–738. https://cris.mruni.eu/server/api/core/bitstreams/456e7d6a-a8cc-4946-aafa-cf1574fee552/content.

Ivoška, Girius. “Commentary on Article 191 of the Criminal Code.” In *Lietuvos Respublikos baudžiamojo kodekso komentaras. Specialioji dalis (99-212 straipsniai)*, edited by Gintaras Švedas. Registrų centras, 2009.

Kiškis, Mindaugas, and Gintautas Šulija. “Baudžiamoji atsakomybė už intelektinės nuosavybės teisių pažeidimus Europos valstybėse.” *Teisė* 49 (2003): 52–65. https://etalpykla.lituanistika.lt/fedora/objects/LT-LDB-0001:J.04~2003~1367189688000/datastreams/DS.002.0.01.ARTIC/content.

McCabe, Donald L., Linda Klebe Treviño, and Kenneth D. Butterfield. “Cheating in Academic Institutions: A Decade of Research.” *Ethics & Behavior* 11, no. 3 (2001): 219–232. https://doi.org/10.1207/S15327019EB1103_2.

Mizaras, Vytautas. *Autorių teisė. Volume I*. Justitia, 2008.

Mizaras, Vytautas. *Autorių teisė. Volume II*. Justitia, 2009.

Švedas, Gintaras. *Lietuvos Respublikos baudžiamojo kodekso komentaras. Specialioji dalis (99-212 straipsniai).* Registrų centras, 2009.

Žentelytė, Ieva. “Ultima ratio: ar neperžengta riba?” *Mokslinės minties šventė* (2013): 49–62. Accessed May 14, 2026. https://cris.mruni.eu/server/api/core/bitstreams/3f968753-4bd3-47af-8ff5-2415c0c729ed/content.

Žiedė, Ramunė. “Criminal Liability for the Misappropriation of Authorship from 1830s to Early 20th Century.” *Teisė* 120 (2021): 83–103. https://doi.org/10.15388/Teise.2021.120.6.

Legal acts

The Parliament of the Republic of Lithuania. Republic of Lithuania Law on Copyright and Related Rights. No. VIII-1185. May 18, 1999.

The Parliament of the Republic of Lithuania. Law on Amending Articles 35, 142, 308, 321(2) of the Criminal Code of the Republic of Lithuania and Supplementing the Code with Articles 142(1), 142(2), 142(3). No. VIII-1646. April 20, 2000.

The Parliament of the Republic of Lithuania. Republic of Lithuania Law on the Approval and Entry into Force of the Criminal Code. No. VIII-1968. September 26, 2000.

The Parliament of the Republic of Lithuania. Law of the Republic of Lithuania on the Approval, Entry into Force and Implementation of the Code of Administrative Offences. No. XII-1869. June, 25, 2015.

Jurisprudence

Administrative cases

Supreme Administrative Court of Lithuania. Decision in administrative case no. eA-131-822/2017. April 10, 2017.

Supreme Administrative Court of Lithuania. Decision in administrative case no. A-502-415/2020. June 23, 2020.

Supreme Administrative Court of Lithuania. Decision in administrative case no. A-1786-662/2020. July 8, 2020.

Supreme Administrative Court of Lithuania. Decision in administrative case no. eA-651-463/2023. September 20, 2023.

Supreme Administrative Court of Lithuania. Decision in administrative case no. eA-689-525/2023. October 18, 2023.

Supreme Administrative Court of Lithuania. Decision in administrative case no. eA-757-552/2023. October 25, 2023.

Vilnius Regional Administrative Court. Decision in administrative case no. eI-7418-629/2015. November 9, 2015.

Vilnius Regional Administrative Court. Decision in administrative case no. I-2273-244/2018. September 11, 2018.

Vilnius Regional Administrative Court. Decision in administrative case no. I-1015-244/2019. March 27, 2019.

Vilnius Regional Administrative Court. Decision in administrative case no. eI3-4814-860/2020. December 9, 2020.
Vilnius Regional Administrative Court. Decision in administrative case no. eI3-873-535/2022. May 5, 2022.
Vilnius Regional Administrative Court. Decision in administrative case no. eI3-440-561/2022. May 25, 2022.

Criminal cases

Supreme Court of Lithuania. Ruling in criminal case no. 2K-253/2014. May 13, 2014.
Supreme Court of Lithuania. Ruling in criminal case no. 2K-79-976/2024. April 9, 2024.
Kaunas Regional Court. Ruling in criminal case no. 1A-363-81-2010. November 3, 2010.
Kaunas Regional Court. Ruling in criminal case no. 1A-316-579/2020. June 17, 2020.
Kaunas Regional Court. Ruling in criminal case no. 1A-110-954/2023. September 4, 2023.
Vilnius Regional Court, March 10, 2009, ruling in criminal case No. 1S-137-51/2009.
Anykščiai District Court. Ruling in criminal case no. 1-9-266/ 2006. January 13, 2006.
Panevėžys City District Court. Criminal order in criminal case no. T-417-591-2005. April 5, 2005.

Civil cases

Supreme Court of Lithuania. Ruling in civil case no. 3K-3-515. May 8, 2000.
Supreme Court of Lithuania. Ruling in civil case no. 3K-3-551-611/2015. November 6, 2015.
Lithuanian Court of Appeal. Ruling in civil case no. 2A-111. April 7, 2003.
Lithuanian Court of Appeal. Ruling in civil case no. 2A-275. September 5, 2005.
Lithuanian Court of Appeal. Ruling in civil case no. 2A-61/2013. April 11, 2013.
Lithuanian Court of Appeal. Ruling in civil case no. 2A-499/2013. July 3, 2013.
Lithuanian Court of Appeal. Ruling in civil case no. 2A-733/2013. October 21, 2013.
Lithuanian Court of Appeal. Ruling in civil case no. 2A-1082/2013. December 5, 2013.
Lithuanian Court of Appeal. Ruling in civil case no. 2A-230-823/2018. April 27, 2018.
Lithuanian Court of Appeal. Ruling in civil case no. e2A-18-934/2023. January 26, 2023.
Kaunas Regional Court. Ruling in civil case no. 2-1370-390/2015. December 9, 2015.
Klaipėda Regional Court. Ruling in civil case no. 2-194-826/2017. March 21, 2017.
Klaipėda Regional Court. Ruling in civil case no. e2A-590-1092/2024. June 13, 2024.
Vilnius Regional Court. Ruling in civil case no. 2A-1366-661/2012. February 1, 2012.

Vilnius Regional Court. Ruling in civil case no. 2A-731-881/2016. November 29, 2016.
Vilnius Regional Court. Ruling in civil case no. e2-1306-881/2017. January 18, 2017.
Vilnius City District Court. Ruling in civil case no. 2-3992-905/2013. March 20, 2023.

Online and other sources

Ceizarienė, Beatričė, and Elena Ruikytė. "Legalaus skaitmeninio turinio vartojimo ir antipiratavimo skatinimas. Esamos situacijos analizė." LR kultūros ministerija, Kurk Lietuvai, 2023. Accessed April 20, 2026. https://data.kurklt.lt/wp-content/uploads/2023/04/Esamos-situacijos-analize.pdf.

McIntosh, Matthew A. "Authorship, Authenticity, and Intellectual Theft Ancient Greece and Rome." *Brewminate: A Bold Blend of News and Ideas*. April 8, 2026. https://brewminate.com/ancient-plagiarism-greece-rome/.

Liteko.teismai.lt. "Vieša sprendimų paieška." Accessed April 20, 2026. https://liteko.teismai.lt/viesasprendimupaieska/detalipaieska.aspx?detali=2.

Infolex. Accessed April 20, 2025. https://www.infolex.lt/landing.

Plagiarism Checker X. "Global Plagiarism Live Statistics." Accessed April 20, 2026. https://plagiarismcheckerx.com/global-plagiarism-live-stats?AFFILIATE=99715&__c=1.

Plagiarism.org. "Plagiarism: Facts & Stats." Jun 7, 2017. https://www.plagiarism.org/article/plagiarism-facts-and-stats.

Židonė, Gintarė, Kamilė Kapočiūtė, and Regimantas Juras. *Bendraautorystė: profesorių publikavimosi aspektai. Tyrimo ataskaita*. Akademinės etikos ir procedūrų kontrolieriaus tarnyba, 2019. Accessed April 20, 2026. https://etikostarnyba.lt/wp-content/uploads/2019/11/Tyrimo-ataskaita_final.pdf.

Abstract

Problems of the Distinction Between Different Types of Legal Liability for Misappropriation of Authorship

The Lithuanian legal system establishes civil, criminal and administrative liability for misappropriation of authorship, but the criteria for distinguishing between them are unclear. The article analyses all publicly available case law in all categories of misappropriation of authorship seeking to draw a line between the different types of liability for misappropriation of authorship by providing criteria based on which cases should be classified as civil, administrative or criminal proceedings.

The analysis demonstrates that while civil liability constitutes an essential and irreplaceable element of protection against misappropriation of authorship in Lithuania, it is insufficient on its own and must be supplemented by administrative and criminal law measures. However, the current regulation lacks coherence: administrative liability is limited to the submission of another person's academic or study work to educational and research institutions, whereas criminal liability is formulated more broadly, despite being restricted to publication and public communication as forms of use. Article 191(1) of the Criminal Code should therefore be revised to cover other relevant forms of public use while defining the prohibited conduct more precisely in order to avoid overbroad application and reliance on the *ultima ratio* principle. At the same time, a clearer gradation between administrative and criminal liability is required so that less harmful cases of misappropriation of authorship fall within the scope of administrative liability, while criminal liability is reserved for the most serious cases. The introduction of additional subjective elements into the criminal offence may contribute to such differentiation, although further empirical research is necessary to identify the motives and intentions that typically underlie acts of misappropriation of authorship.

Keywords: intellectual property, misappropriation of authorship, plagiarism, criminal law, author law

Santrauka

Skirtingų teisinės atsakomybės rūšių už autorystės pasisavinimą takoskyros problemos

Šiuo metu Lietuvos teisinėje sistemoje už autorystės pasisavinimą įtvirtinta tiek civilinė, tiek baudžiamoji, tiek administracinė atsakomybė, tačiau jų atribojimo kriterijai yra neaiškūs. Straipsnyje analizuojama visa viešai prieinama teismų praktika visų kategorijų autorystės pasisavinimo bylose, siekiant nubrėžti takoskyrą tarp skirtingų atsakomybės už autorystės pasisavinimą rūšių, pateikiant kriterijus, kuriais remiantis bylos turėtų būti priskiriamos civilinei, administracinei ar baudžiamajai teisenai.

Atlikta analizė rodo, kad nors civilinė atsakomybė yra esminis ir nepakeičiamas apsaugos nuo autorystės pasisavinimo elementas Lietuvoje, vien jos nepakanka ir ją būtina papildyti administracinėmis bei baudžiamosiomis teisinės apsaugos priemonėmis. Dabartiniame reguliavime trūksta nuoseklumo: administracinė atsakomybė apsiriboja kito asmens parengto mokslo ar studijų darbo (ar jo dalies) projekto pateikimu mokslo ir studijų institucijai kaip savo, o baudžiamoji

atsakomybė suformuluota plačiau, nors ir apsiriboja tik išleidimu ar viešu paskelbimu kaip kūrinio naudojimo formomis. Todėl baudžiamojo kodekso 191 straipsnio 1 dalis turėtų būti peržiūrėta, kad apimtų ir kitas reikalingas kūrinio viešo naudojimo formas, o draudžiamas elgesys turėtų būti apibrėžtas tiksliau, siekiant išvengti pernelyg plačios normos taikymo srities, lemiančios platesnį *ultima ratio* principo naudojimą. Tuo pačiu metu reikalingas aiškesnis administracinės ir baudžiamosios atsakomybės suskirstymas, kad mažiau žalingi autorystės pasisavinimo atvejai patektų į administracinės atsakomybės taikymo sritį, o baudžiamoji atsakomybė būtų taikoma tik pačiais sunkiausiais atvejais. Papildomų subjektyvių elementų įtraukimas į nusikalstamos veikos sudėtį gali prisidėti prie tokio diferencijavimo, tačiau reikalingi tolesni empiriniai tyrimai, siekiant nustatyti įprastus autorystės pasisavinimo padarymui būdingus kaltininko motyvus ir tikslus.

Pagrindiniai žodžiai: intelektinė nuosavybė, autorystės pasisavinimas, plagijatas, baudžiamoji teisė, autorių teisė

The Intersections of Criminal, Administrative and Civil Law:
International and National Contexts, pp. 97–116
https://doi.org/10.12797/9788383685328.04

Laura Šivickaitė
Vilnius University, Faculty of Law
laura.sivickaite@tf.vu.lt

The Relationship Between Criminal and Civil Liability of Doctors: The Example of Lithuania and Other European Countries

The single greatest impediment to error prevention is that we punish people for making mistakes.[1]

1. Introduction

Advances in medicine and the increasing complexity of healthcare services inevitably contribute to the growing importance of issues related to legal liability. Although the medical profession is primarily associated with the protection of human life and health, medical practice remains one of the most risk-prone professional activities, in which adverse outcomes for patients cannot always be avoided even when physicians act diligently and in accordance with professional standards. For this reason, both national and foreign legal scholarship, as well as judicial practice, continuously debate the limits of physicians' legal liability, the grounds for its application, and the most appropriate means of protecting patients' rights.

Traditionally, the protection of patients' rights has been associated with the institution of civil liability, the primary purpose of which is to compensate patients for damage resulting from inadequate healthcare services. However, in certain circumstances, the conduct of healthcare professionals may exceed the boundaries of acceptable professional risk and give rise to criminal liability.

1 Dr. Leape Lucian L., Professor, Harvard School of Public Health.

At the same time, an increasing number of countries have sought alternative mechanisms for protecting patients' rights by introducing no-fault compensation systems, which enable patients to obtain compensation without proving the fault of a physician or healthcare institution. Equally important in contemporary medical law is the doctrine of informed consent, which is regarded as one of the fundamental guarantees of patient autonomy and the right to make decisions concerning one's own healthcare.

The issue of physicians' legal liability is significant not only because of the need to ensure effective protection of patients' rights, but also because of the necessity to maintain a balance between patients' interests and physicians' professional autonomy. Excessively broad application of criminal liability may encourage so-called defensive medicine, whereby physicians make decisions not solely on the basis of medical considerations but also with a view to avoiding potential legal consequences. Conversely, an overly narrow conception of liability may weaken the protection of patients' rights and undermine public confidence in the healthcare system.

The aim of this article is to analyse the relationship between criminal and civil liability of physicians, to discuss the significance of the no-fault compensation model for the protection of patients' rights, and to examine the role of informed consent within the legal framework.

The study employs systemic, analytical, comparative, and historical research methods. The article is based on Lithuanian and foreign legislation, case law, and legal doctrine.

The article consists of four parts. The first part analyses the grounds for physicians' criminal liability and the peculiarities of its application in various European countries. The second part examines the relationship between criminal and civil liability. The third part discusses the no-fault compensation model and its development in Lithuania and foreign jurisdictions. The fourth part analyses the significance of informed consent as a safeguard of patients' rights and the lawfulness of physicians' actions.

2. Physicians' Criminal Liability

Hippocrates (c. 460–c. 370 BC), the most renowned physician of Ancient Greece, is often referred to as the 'Father of Medicine' and the 'Founder of Medical Ethics', and is best known for the oath that bears his name. Traditionally associated with Hippocrates is the principle *primum non nocere* (Latin for 'first, do no

harm').[2] A similar idea is reflected in the Hippocratic Oath, which establishes the physician's fundamental duty to protect human life and its inviolability from its beginning until natural death, while refraining from the use of diagnostic and therapeutic methods that may be harmful to human life and health.[3] For example, in ancient India there was a saying: *One may fear a brother, a mother, or a friend, but never a physician*,[4] in the twenty-first century, medical negligence has been recognised as a major global healthcare challenge.[5] When viewed in the context of contemporary realities, however, this principle acquires a somewhat different meaning. Statistical data indicate that medical errors have become a systemic problem worldwide. According to some studies, medical errors are responsible for approximately 251,000 deaths annually in the United States, making them the third leading cause of death. Legal scholarship has suggested that the utopian physician would be Hippocrates himself – a brilliant and all-knowing practitioner who always knows the one correct course of action. In reality, however, no such Hippocratic physician exists.[6] Critical views on physicians' criminal liability have also been expressed by representatives of the Lithuanian medical community. For example, Professor V. Kasiulevičius has noted that: *When making decisions during surgery or prescribing a diagnostic or therapeutic procedure or pharmacological treatment, a physician seeks to save the patient. Even when all actions are performed properly, the outcome is far from always the one we expect. Therefore, I view the application of criminal liability to medical professionals for medical errors unequivocally negatively.*[7]

It is therefore reasonable to conclude that medicine is an inherently high--risk profession. Physicians are often required to make complex decisions in

---

2 Kenneth Lecroy, "The Lie of Primum non Nocere," *American Family Physician* 64, no. 12 (2001):1942, https://www.aafp.org/pubs/afp/issues/2001/1215/p1942.html; Laura Šivickaitė-Moldarienė, "Teismo eksperto mokslinės-praktinės ir procesinės kompetencijos vertinimo ypatumai ir pasekmės teisingam teismo sprendimui" (PhD diss., Vilnius university, 2024), https://doi.org/10.15388/vu.thesis.602.

3 Visuomenės sveikata, "The Hippocratic Oath" 1997, https://web.archive.org/web/20190730220718/http://www.lsmuni.lt/vs-biblioteka/pagalb/hipokrat.htm#virsus; Laura Šivickaitė-Moldarienė, "Teismo eksperto."

4 Juozas Markulis and Jonas Vytautas Nainys, *Teismo medicina: vadovėlis medicinos institutų studentams* (Mokslas, 1979).

5 Pan Gao et al., "Diagnostic Errors in Fatal Medical Malpractice Cases in Shanghai, China: 1990–2015," *Diagnostic Pathology* 14, no. 8 (2019): 1–11, https://doi.org/10.1186/s13000-019-0785-5.

6 Miha Šepec, "Medical Error – Should it be a Criminal Offence?" *Medicine, Law and Society* 11, no. 1 (2018): 47–66, https://doi.org/10.18690/2463–7955.11.1.47-66.

7 Dovilė Murauskienė, "Baudžiamosios sankcijos medikams: daugiau atrandame ar prarandame?" *Teismai.lt* 5, no 37 (2020): 15–17, https://www.infolex.lt/landing?act=news&Tema=49&Str=69273.

order to save human life. For example, in the United Kingdom, approximately 2 percent of patients admitted to acute care hospitals suffer serious harm as a result of healthcare errors.[8] In Germany, approximately 12,000 cases of medical malpractice are identified each year. Around 150 criminal investigations are initiated annually; however, healthcare professionals are convicted in only about four of these cases, either because no medical error is ultimately established or because a causal link between the alleged error and the harm suffered cannot be proven. The most common examples of harm resulting from medical errors include retained surgical instruments, wrong-patient procedures, wrong-site surgery, operations on the wrong finger, overly tight casts, removal of the wrong organ, blood transfusion errors, surgical mistakes, and similar incidents.[9]

As early as 1891, the French Court of Cassation held that the provisions of the Criminal Code apply to members of all professions, including medical professionals.[10] In France, the majority of cases in which healthcare professionals are defendants concern the offences of involuntary manslaughter and negligent bodily injury.[11] In Lithuania, healthcare professionals may incur criminal liability for negligent homicide, assisting suicide, causing serious or non-serious bodily injury through negligence, performing an unlawful abortion, failure to provide assistance to a person whose life is in danger, failure to perform official duties, and conducting prohibited biomedical research on a human being or a human embryo.[12] In Lithuanian legal doctrine, cases in which healthcare professionals are accused of causing bodily injury or the death of a patient are commonly referred to as *medical criminal cases* (or *criminal cases of a medical nature*).[13] The Criminal Code of the Federal Republic of Germany expressly provides for the criminal liability of physicians in a number of situations, including unlawful bodily injury through medical treatment or surgery performed without the patient's valid consent, negligent homicide, breach of medical confidentiality, killing upon the patient's request, issuing false medical certificates, failure

8 Šepec, "Medical Error," 47–66.

9 Burkhard Madea and Reinhard Dettmeyer, *Teisės medicinos pagrindai* (Mykolo Romerio universitetas, 2010).

10 Isabelle Ferrari, "Le médecin devant le juge penal," in *Rapport annuel de la Cour de cassation* 1999, https://web.archive.org/web/20210517154823/https://www.courdecassation.fr/publications_26/rapport_annuel_36/rapport_1999_91/etudes_documents_93/isabelle_ferrari_5792.html.

11 Isabelle Ferrari, "Le médecin devant le juge penal."

12 Šivickaitė-Moldarienė, "Teismo eksperto."

13 Laura Šivickaitė-Moldarienė, "Deontologinės ekspertizės išvadų reikšmė Lietuvos baudžiamajame procese," *Teisė* 120 (2021): 104–116, https://doi.org/10.15388/Teise.2021.120.7; Šivickaitė-Moldarienė, "Teismo eksperto."

to provide medical assistance, disturbing the peace of the deceased (for example, by conducting an unlawful autopsy), and the unlawful prescription, administration, or distribution of narcotic substances.[14]

Legal scholarship indicates that, in European countries belonging to the continental legal tradition, as well as in Japan, it is common to impose criminal liability on healthcare professionals who provide medically inadequate treatment that results in the deterioration of a patient's health or in the patient's death, where such consequences could have been avoided had the healthcare professional not acted negligently or carelessly in the course of treatment.[15]

Nevertheless, models of criminal liability differ from one jurisdiction to another. Slovenia is rather distinctive in this respect, as its Criminal Code contains a specific criminal offence of *negligent treatment* (Article 179). Under this provision, a healthcare professional who violates the rules and standards of medical science and professional practice and, through negligence, causes a significant deterioration in a patient's health may be punished by imprisonment for up to three years. Article 179(3) further provides that where such conduct results in the patient's death, the offender shall be subject to a term of imprisonment ranging from one to eight years.[16] The existence of Article 179 of the Slovenian Criminal Code, entitled 'Negligent Medical Treatment and Healthcare Activity', essentially means that a physician whose negligent conduct results in a patient's death will not be prosecuted under Article 118 of the Criminal Code for negligent homicide. Likewise, where a physician's conduct causes serious bodily injury to a patient, liability will arise exclusively under Article 179 rather than under Article 123 ('Serious Bodily Injury').[17] Under Article 88(2) of the Austrian Criminal Code, bodily injury caused by negligence is decriminalised where it occurs in the lawful exercise of a regulated healthcare profession and does not involve gross negligence.[18]

There is no doubt that, in criminal law, the first issue that must be considered when determining whether a physician's negligence or a medical error constitutes a criminal offence is whether the standards of the medical profession have been breached. The crucial question is whether the conduct of the particular healthcare professional actually departed from the professional standards generally accepted within the medical community. However, it should

14 Madea and Dettmeyer, *Teisės medicinos pagrindai*.
15 Šepec, "Medical Error," 47–66.
16 Šepec, "Medical Error," 47–66.
17 Šepec, "Medical Error," 47–66.
18 Šepec, "Medical Error," 47–66.

also be borne in mind that not every deterioration of a patient's health or even a patient's death occurring during treatment is the direct result of a medical error, that is, a breach of the required standard of care. In some cases, both the deterioration of health and death may constitute a natural consequence of the patient's underlying condition that could not have been prevented even with the best possible medical treatment.[19] A physician who performs surgery while intoxicated, leaves a surgical instrument inside a patient's body, carelessly identifies the wrong limb for surgery, or otherwise acts in a manifestly negligent or reckless manner cannot be excused. Such conduct cannot be ignored or justified on the basis of general assertions that medicine is a socially beneficial activity or that physicians should not be held accountable for serious professional misconduct merely because they provide assistance to others.[20] In the clearest and most indisputable cases of medical negligence or carelessness, where a physician's improper conduct results in serious bodily injury to a patient or even in the patient's death, criminal liability should be imposed. Such liability may arise either under a specific criminal offence addressing medical malpractice or negligent treatment, or under the general provisions of criminal law governing negligent homicide, causing death by negligence, bodily injury, impairment of health, or other comparable offences.[21]

The issue of physicians' criminal liability and professional immunity has not been extensively examined in Lithuanian legal scholarship. In contrast, foreign legal literature has engaged in discussions concerning the possible need for a form of professional immunity for physicians, drawing an analogy with judicial immunity. It has been argued that, just as judges must be protected from unfounded criminal prosecution in order to perform their functions independently, physicians may likewise require a certain degree of protection to enable them to make complex medical decisions without undue fear of criminal liability. However, the Constitutional Court of Slovenia has emphasised that judicial immunity is not intended to protect judges as individuals, but rather to safeguard the proper functioning of the judiciary. For this reason, the application of such an analogy to physicians has been approached with caution.[22]

In conclusion, criminal liability in medical cases is generally regarded in European legal systems as an exceptional measure, applicable only where a physician's conduct clearly departs from accepted professional standards

19 Šepec, "Medical Error," 47–66.
20 Šepec, "Medical Error," 47–66.
21 Šepec, "Medical Error," 47–66.
22 Šepec, "Medical Error," 47–66.

and results in serious harm to a patient. Although debates concerning the limits of physicians' criminal liability remain ongoing, both Lithuanian and foreign practice demonstrate that the nature of the medical profession does not, in itself, exempt healthcare professionals from responsibility for gross professional misconduct.

3. The Relationship Between Criminal and Civil Liability

Damage caused to a patient in the course of a physician's professional practice may give rise to different forms of legal liability. Most commonly, this involves criminal and civil liability, which, although they may arise from the same event, pursue different objectives, are based on different legal premises, and produce different legal consequences. For this reason, both Lithuanian law and the legal systems of other European countries continue to address the question of when criminal liability should be imposed, when civil liability provides a sufficient remedy, and under what circumstances these two forms of liability may coexist.

Physicians owe a number of legal duties to their patients, and the breach of such duties may give rise to claims in civil liability. By way of comparison, in the United States, patients who suffer injury or damage as a result of a physician's error may seek legal redress through civil liability proceedings.[23] Nevertheless, there are also notable examples of the application of criminal liability in medical practice. For instance, the Superior Court of Los Angeles convicted the physician of singer Michael Jackson of involuntary manslaughter based on criminal negligence. The jury found the physician guilty of causing the singer's death after his heart stopped as a result of an overdose of anaesthetic drugs. It was established that, for approximately two months, the physician had repeatedly endangered Jackson's life by administering the medication nightly as a sleep aid, despite the fact that the drug was intended for use only in a hospital setting under appropriate medical supervision. The court concluded that the administration of this medication was the direct cause of the singer's death.[24]

As regards the civil liability of physicians and other healthcare professionals in cases where their acts or omissions cause harm to a patient's health or life, there is little fundamental controversy. It is generally accepted that damage

23 Sonny B. Bal, "The Expert Witness in Medical Malpractice Litigation," *Clinical Orthopaedics and Related Research* 467, no. 2 (2009): 383–391, https://doi.org/10.1007/s11999-008-0634-4.

24 Los Angeles County, The People of the State of California vs. Defendant 01: Robert Murray, case no. SA073164, November 23, 2011.

that has been caused must be compensated. It should be noted that, in civil proceedings, the defendant is typically the healthcare institution, which bears tort liability for the harm suffered by the patient.

A physician's act or omission that, through fault, creates a risk to or causes damage to a patient's health is regarded as a medical malpractice error, that is, an error committed in the course of healthcare activities performed within the physician's professional qualifications and competence, including the assessment of a patient's health condition, disease prevention, diagnosis, and treatment. Gross medical malpractice is generally understood as conduct by a physician that, through fault, causes harm resulting in the patient's disability or death.[25] The Institute of Medicine of the United States defines a medical error as either the failure of a planned action to be completed as intended or the use of an incorrect plan to achieve a particular aim. Such errors may arise from both acts and omissions on the part of a physician. Harm resulting from the improper prescription of medication, the administration of an incorrect dosage, or the performance of an inappropriate or poorly executed medical procedure is generally regarded as a medical error.

German legal practice distinguishes between ordinary and gross treatment errors. An ordinary treatment error may occur, for example, where the lingual nerve is injured during the extraction of a wisdom tooth. By contrast, a gross treatment error is found where a physician violates established rules of medical treatment or disregards accepted medical knowledge in a manner that is objectively inexplicable. An example would be the failure to detect an obviously visible fracture of the femoral neck on an X-ray image, resulting in the patient not receiving the appropriate treatment.[26] In some foreign legal scholarship, major medical errors are defined as clinically missed diagnoses relating to the patient's primary disease or the principal cause of death.[27]

Civil liability is based on the general principle that any harm caused to another person must be compensated. Physicians' civil liability for improper treatment constitutes a form of professional liability, that is, liability arising from the improper performance of professional duties. It represents a specific

25 Parliament of the Republic of Lithuania, Lietuvos Respublikos medicinos praktikos įstatymas, no. I-1555, October 25, 1996, https://www.e-tar.lt/portal/lt/legalAct/TAR.10E8E285740C/asr.

26 Madea and Dettmeyer, *Teisės medicinos pagrindai*; Sandra Mažeikienė, "Deontologinių ekspertizių etinis, teisinis, teismo medicininis pagrindimas, vertinant profesinius gydytojų nusižengimus ir klaidas" (PhD diss., Vilniaus universiteto leidykla, 2020).

27 Stephan D. Kurz et al., "Discrepancies Between Clinical Diagnosis and Hospital Autopsy: A Comparative Retrospective Analysis of 1,112 Cases," *PLoS One* 16, no. 8 (2021): e0255490, https://doi.org/10.1371/journal.pone.0255490.

manifestation of the elements of unlawful conduct and fault as conditions for civil liability. In the United States, the first medical malpractice lawsuit was recorded in Connecticut in 1794, following the death of a patient as a result of a surgical complication.[28] In a landmark decision rendered in 1936, the French Court of Cassation held that although a physician, by virtue of his or her professional expertise, cannot guarantee a patient's recovery, the physician is nevertheless under a duty to provide conscientious, diligent, and attentive care consistent with the knowledge and standards of the medical profession.[29] Contemporary Lithuanian case law in civil proceedings identifies the physician's primary duty as the provision of qualified and diligent medical care. The obligation arising between a patient and a physician does not consist in guaranteeing a specific outcome but rather in ensuring that the obligation is performed with the utmost effort, that is, by exercising the highest possible degree of care, diligence, caution, and professional competence.[30]

An injured person may choose either to initiate criminal proceedings and seek compensation by bringing a civil claim within the criminal case, or to commence separate civil proceedings. The key distinction is that, in criminal proceedings, the healthcare professional whose conduct resulted in injury to health or the loss of life is treated as the defendant, whereas both pecuniary and non-pecuniary damages are typically awarded against the employer, who participates in the proceedings as a civil defendant. In civil proceedings, by contrast, the defendant is usually the employer, while the healthcare professional who caused the damage is commonly involved as a third party without independent claims on the defendant's side.[31] Thus, the principal distinction between criminal and civil liability lies in their respective purposes. The aim of civil liability is to compensate the injured party for the harm suffered, whereas the purpose of criminal liability is to identify the offender and impose punishment.

As rightly observed by the French health law scholar Anne Laude, although criminal liability may be the most effective means of establishing the truth in a case, it also entails the most severe consequences for healthcare professionals, since its primary objective is to determine guilt and punish the offender.[32] In 1997,

---

28 Leonard Berlin, "Medical Errors, Malpractice, and Defensive Medicine: an Ill-fated Triad," *Diagnosis* 4, no. 3 (2017): 133–139, https://doi.org/10.1515/dx-2017–0007.

29 Cour de cassation, Chambre civile, arrêt Mercier, May 20 1936.

30 Supreme Court of Lithuania, ruling in civil case no. 3K-3-603-701/2015, November 20, 2015.

31 Šivickaitė-Moldarienė, "Teismo eksperto."

32 Anne Laude, "La judiciarisation en France, sur la trace des États-Unis?" *Les Tribunes de la santé* 1, no. 26 (2010): 49–59, https://doi.org/10.3917/seve.026.0049.

21 medical incidents were reported to the Japanese police, whereas by 2003 that number had increased to 248. Despite the rise in the number of reported incidents, the quality of patient care in Japan improved significantly during the same period. This suggests that the prospect of criminal liability may serve as a deterrent and assist the state in preventing serious instances of misconduct in medical practice.[33]

For example, Slovenian case law has relaxed the standards of proof in medical malpractice cases for two principal reasons. First, the outcome of medical treatment is inherently uncertain and not always predictable. Second, patients are often unable to prove a breach of the professional standard of care because they lack access to information and specialised knowledge, which, as discussed above, are typically within the exclusive control of healthcare providers. Consequently, certain procedural rules have been developed in medical cases to alleviate the evidentiary burden placed on injured patients, who are recognised as the weaker party in the legal relationship. In this context, a departure from the traditionally high standard of proof is considered both necessary and desirable in order to provide effective protection to patients and to ensure substantive justice.

In case No. II Ips 17/2015, the Supreme Court of Slovenia, when addressing the proof of breach of contractual obligations and causation in a medical negligence dispute, held that the 'balance of probabilities' standard is satisfied where there is a greater than fifty percent likelihood that the relevant facts occurred. The Court emphasised that establishing the causes of a medical error is often a highly hypothetical process. Accordingly, it is sufficient for the claimant to demonstrate that proper conduct by the healthcare professional would have significantly improved the patient's medical condition. Nevertheless, even under a reduced evidentiary standard, the court must carefully assess and adequately verify whether the claimant has succeeded in proving the facts relating to the specific elements of civil liability.

In the well-known Šilih case concerning the causes of death in a medical negligence context, the European Court of Human Rights stressed the importance of an effective and independent system capable of determining both the causes of a patient's death in a hospital setting and the responsibility of medical professionals, thereby ensuring the protection of the right to life under Article 2 of the European Convention on Human Rights. The Court's reasoning, later adopted by the Constitutional Court of Slovenia in decision No. Up-680/14,

33 Šepec, "Medical Error," 47–66.

underscored the State's obligation to provide injured persons and claimants with a clear and comprehensive explanation of the causes of death and of any potential liability for the damage caused.

Another noteworthy feature of German law is a doctrine similar to the common-law principle of *res ipsa loquitur* ('the thing speaks for itself'), based on the concept of *prima facie* evidence (*Anscheinbeweis* or *Prima-Facie-Beweis*). This doctrine is applied in exceptional circumstances where the occurrence itself clearly indicates that a medical error has taken place. Typical examples include cases in which a surgical instrument is left inside a patient's body after surgery or where a patient suffers burns caused by medical equipment, provided that expert evidence confirms that such consequences would not ordinarily occur in the absence of negligence. The doctrine is applied particularly frequently in cases involving HIV infection contracted through blood transfusions.[34]

Thus, criminal liability may arise only where all the constituent elements of a particular criminal offence have been established. In criminal cases involving medical treatment, particular importance is attached to proving a causal link between the unlawful act or omission of a healthcare professional and the harmful consequence that occurred, such as a patient's death or bodily injury. Consequently, not only the conduct itself but also its impact on the patient's life or health – that is, the result of the act or omission – is of decisive significance.

A different approach applies in the context of civil liability. In such cases, the decisive issue is not solely the outcome of the treatment but also whether the healthcare professional acted with the required degree of care, diligence, attentiveness, and professional competence.

In conclusion, criminal and civil liability in medical law should not be regarded as competing but rather as complementary legal mechanisms. Civil liability is primarily aimed at restoring the injured patient's interests and compensating for the harm suffered, whereas criminal liability serves to protect society from serious professional misconduct. Accordingly, the relationship between these forms of liability should be understood as a mechanism for achieving different, yet complementary, legal objectives.

34 Nina Cek, "The Standards of Proof in Medical Malpractice Cases," *Medicine, Law & Society*, 13, no. 2 (2020): 173–196, https://doi.org/10.18690/mls.13.2.173-196.2020.

4. No-Fault Compensation Model

Some countries have introduced so-called *no-fault compensation* systems. The purpose of such systems is to simplify the process by which injured patients obtain compensation for harm suffered as a result of medical treatment and healthcare services.

Under this model, a patient may be compensated regardless of whether the harm resulted from a physician's negligence. The only essential requirement is to demonstrate that the injury was caused by the medical treatment or healthcare provided. Some countries, including Slovenia, have adopted partial no-fault compensation schemes in specific areas of healthcare, such as cases involving vaccine-related injuries. Austrian law likewise provides a compensation mechanism for injuries sustained in public hospitals where there are grounds to believe that the harm resulted from improper treatment, but where specific medical negligence cannot be proven. Significant differences exist between the no-fault compensation systems implemented in the Scandinavian countries and New Zealand, particularly with regard to evidentiary requirements. In the Scandinavian model, the first stage of the compensation process takes place through an administrative procedure, with decisions being made by specialised public authorities. The second stage takes place before a court. The court assesses whether the patient's condition deteriorated as a result of avoidable harm. For example, in Denmark, Finland, and Sweden, the inquiry focuses on whether the deterioration was caused by acts that could have been avoided, whereas in Norway the central question is whether the treatment provided was inappropriate. In addition, the authorities may examine whether a medical error or a medical accident occurred.

In all of these countries except Norway, the burden of proving causation rests on the injured patient. In Norway, by contrast, the burden of proof is placed on the healthcare provider. Denmark, Finland, and Sweden apply a probability criterion under which it is sufficient to establish that there is a greater than fifty percent likelihood that a causal link exists and that the injury was caused by medical treatment. In such circumstances, the patient is considered to have suffered compensable harm. In New Zealand's no-fault compensation system, causation is likewise assessed according to the 'balance of probabilities' standard, although the evidentiary requirements are less stringent than those ordinarily applied in civil litigation. In all of these systems, patients are not required to gather and submit medical records themselves, as the relevant

documentation is collected and provided by the authority responsible for making the decision.

Under Slovenia's partial no-fault compensation scheme, which applies to injuries resulting from mandatory vaccination and to HIV infections transmitted through blood or blood-product transfusions, compensation is awarded pursuant to administrative law provisions, and the resulting decisions may subsequently be challenged before an administrative court.[35]

Lithuania has likewise adopted a no-fault compensation model, which has been applicable to claims for damage to patients' health since 2020. The model is based on the principle that compensation may be awarded without the need to establish the fault of either a healthcare institution or a healthcare professional. It is sufficient to demonstrate that the patient has suffered harm meeting the conditions prescribed by law. The purpose of this approach is to ensure faster and more accessible compensation for patients while reducing the need for lengthy judicial proceedings.

An important feature of the Lithuanian model is that disputes concerning damage to patients' health are initially examined not by courts but by the Commission for the Determination of Damage to Patients' Health operating under the Ministry of Health. This Commission serves as a mandatory pre-trial body responsible for establishing both the existence of a violation of patients' rights and the amount of compensable damage. Only if a person disagrees with the Commission's decision may the dispute be brought before a court. It should be noted that courts are not bound by the amount of compensation determined by the Commission and may award a higher number of damages.

The no-fault compensation model should be viewed as an alternative mechanism for the protection of patients' rights, complementing the traditional systems of civil and criminal liability. The development of the Lithuanian no-fault compensation scheme was significantly influenced by the ruling of the Constitutional Court of the Republic of Lithuania of 24 January 2024.[36] In that decision, the Court held that the then-existing provisions of the Law on Patients' Rights and Compensation for Damage to Health unjustifiably restricted the category of persons entitled to claim compensation for non-pecuniary damage following a patient's death. The Constitutional Court found the regulation to

35 Cek, "The Standards of Proof in Medical Malpractice Cases," 173–196.

36 Constitutional Court of the Republic of Lithuania, Nutarimas dėl Lietuvos Respublikos pacientų teisių ir žalos sveikatai atlyginimo įstatymo 13 straipsnio (2019 m. gruodžio 17 d. redakcija) atitikties Lietuvos Respublikos Konstitucijai, no. KT10-N1/2024, January 24, 2024, https://lrkt.lt/lt/teismo-aktai/paieska/135/ta2955/content.

be incompatible with Article 30(2) of the Constitution, as well as with the constitutional principles of justice and the rule of law. In response to this ruling, the legislature expanded the circle of persons entitled to seek compensation for non-pecuniary damage.

At present, the right to claim compensation for both pecuniary and non-pecuniary damage is granted not only to persons who were dependent on the deceased patient or were legally entitled to maintenance from the patient, but also to other individuals who shared a particularly close and intimate relationship with the deceased. The existence of such a relationship is assessed on a case-by-case basis by the Commission for the Determination of Damage to Patients' Health, taking into account evidence relating to the intensity of personal contact and the mutual care provided between the parties.

The Lithuanian model reflects a broader European trend away from patient compensation systems based exclusively on the principle of fault and toward more effective mechanisms that enable patients to obtain compensation more rapidly. Although the no-fault compensation model does not eliminate the possibility of criminal liability where the legal grounds for such liability exist, it provides patients with an additional and more accessible means of protecting their rights.

5. Informed Consent as a Guarantee of Physicians' Liability and Patients' Rights

In contemporary medical law, one of the most important patient rights is the right to make autonomous decisions regarding one's healthcare and medical treatment. This right is exercised through the doctrine of informed consent, which is regarded not only as an expression of patient autonomy but also as one of the physician's most fundamental professional obligations. Informed consent ensures the patient's right to be informed about his or her health condition, the objectives of the proposed treatment, available alternatives, potential complications, and associated risks, thereby enabling the patient to make an independent decision on the basis of adequate information. Consequently, in modern legal systems, medical treatment without the patient's consent is regarded as the exception rather than the rule.

Lithuanian case law has consistently emphasised that medical treatment provided without the patient's consent constitutes an unlawful act,[37] such

[37] Supreme Court of Lithuania, ruling in civil case no. 3K-3-206, March 30, 2005.

conduct gives rise to legal liability. Medical treatment without a patient's consent is permissible only in exceptional circumstances expressly provided for by law, for example where emergency medical assistance must be rendered in situations of necessity (such as accidents or other emergencies), where the patient is unconscious or otherwise unable to express his or her wishes, and where there is a serious threat to the patient's life or health.[38] Nevertheless, the doctrine of informed consent cannot be reduced to the mere obtaining of a patient's signature on a consent form. The Supreme Court of Lithuania has emphasised that certain aspects of a medical procedure or surgical operation, such as alternative diagnostic and treatment methods, may be explained to the patient in a form that he or she can understand, including orally. However, the patient must confirm by signature that such information has been provided. The fact that a written consent form does not specify the exact implants to be used during a surgical procedure cannot, in itself, be regarded as a violation of the applicable legal requirements. In the case at issue, the claimant had signed the consent form confirming that the procedure had been explained to her and that she understood its nature and consequences.[39]

Article 110 of the Liechtenstein Criminal Code establishes criminal liability for treating another person without his or her consent, even where such treatment complies with accepted standards of medical science. Similarly, Article 192 of the Polish Criminal Code provides for criminal liability for performing a medical procedure without the patient's consent. These examples demonstrate that, in certain jurisdictions, a patient's freedom of self-determination is regarded as such a fundamental value that its violation alone constitutes a sufficient basis for criminal liability. In Lithuanian criminal law, informed consent does not possess the same independent significance as it does in some other European legal systems. Nevertheless, the patient's will may still play a decisive role in assessing a physician's criminal liability in particular situations. For example, the Criminal Code of the Republic of Lithuania contains several offences that may be committed by physicians or other healthcare professionals. One such example is Article 142, which establishes criminal liability for the unlawful performance of an abortion by a physician or another healthcare professional. Notably, such offences may be committed only with the patient's consent, or even at the patient's request. By contrast, a physician's intentional omission to act (that is, the failure to

38 Supreme Court of Lithuania, ruling in civil case no. 3K-3-337/2013, June 26, 2013.

39 Supreme Court of Lithuania, ruling in civil case no. 3K-3-292-686/2016, June 2, 2016.

provide medical treatment), where it does not result in the patient's death or bodily injury, may be classified under Article 144 as abandoning a person in a life-threatening situation without rendering assistance.[40]

Another important aspect of medical law cases concerns the absence of informed consent or inadequate disclosure of information, which is regarded as a breach of the physician's duty toward the patient. In such cases, the patient alleges that he or she was not properly informed of all risks associated with a particular treatment or medical procedure and that this lack of information resulted in the harm or injury suffered. In these circumstances, the patient must establish a causal link between the inadequate disclosure and the damage incurred.

In order to facilitate proof that informed consent has been obtained, the Slovenian legislature, through the Patients' Rights Act, has introduced a special consent form designed specifically for this purpose.[41]

In conclusion, informed consent performs a dual function. On the one hand, it safeguards the patient's right to make autonomous decisions concerning his or her body and health. On the other hand, it serves as an important guarantee of the lawfulness of a physician's actions. Consequently, the duty to provide adequate information and to obtain the patient's free and informed consent is regarded today not merely as a requirement of professional ethics, but also as one of the most important factors defining the boundaries of civil liability and, in some jurisdictions, criminal liability. The doctrine of informed consent demonstrates that a physician's liability in medical law is linked not only to the outcome of treatment but also to the patient's right to participate in decisions concerning his or her own healthcare.

6. Conclusions

1. In European legal systems, physicians' criminal liability is generally regarded as an exceptional form of legal liability, applicable only where a healthcare professional's conduct clearly departs from accepted professional standards and results in serious harm to a patient. Although different jurisdictions employ different approaches – ranging from specific

40 Švedas Gintaras and Aurelijus Gutauskas, Patient Autonomy and Criminal Law: A Lithuanian Perspective," *Patient Autonomy and Criminal Law*, ed. Paweł Daniluk (Routledge, 2023).

41 Cek, "The Standards of Proof in Medical Malpractice Cases," 173–196.

criminal offences addressing medical malpractice (e.g., Slovenia) to the application of general offences against life and health – the prevailing tendency is to avoid automatically equating unsuccessful medical treatment with criminal conduct.

2. Criminal and civil liability in medical law should not be viewed as competing but rather as complementary legal mechanisms. The purpose of civil liability is to restore the injured patient's interests and compensate for the harm suffered, whereas criminal liability is intended to address the most serious violations of professional duties. Accordingly, both forms of liability may arise from the same event, although their legal grounds, objectives, and consequences differ substantially.
3. The development of no-fault compensation systems reflects a broader European trend toward more effective mechanisms for protecting patients' rights than traditional fault-based models. The Lithuanian model enables patients to obtain compensation for health-related injuries more quickly and with fewer procedural obstacles, as it does not require proof of fault on the part of a healthcare institution or professional, while still preserving the possibility of criminal liability where the legal requirements for such liability are satisfied.
4. The doctrine of informed consent performs a dual function in contemporary medical law: it safeguards patient autonomy while simultaneously serving as a guarantee of the lawfulness of physicians' actions. Comparative analysis demonstrates that, in some jurisdictions, the patient's right to decide on medical treatment is protected even through criminal law, making informed consent not merely a requirement of professional ethics but also one of the key factors defining the limits of physicians' legal liability.

References

Laws and regulations, case law

Constitutional Court of the Republic of Lithuania. Nutarimas dėl Lietuvos Respublikos pacientų teisių ir žalos sveikatai atlyginimo įstatymo 13 straipsnio (2019 m. gruodžio 17 d. redakcija) atitikties Lietuvos Respublikos Konstitucijai. No. KT10-N1/2024. January 24, 2024. https://lrkt.lt/lt/teismo-aktai/paieska/135/ta2955/content.

Cour de cassation. Chambre civile, arrêt Mercier. May 20, 1936.

Los Angeles County. The People of the State of California vs. Defendant 01: Robert Murray. Case no. SA073164. November 23, 2011.

Supreme Court of Lithuania. Ruling in civil case no. 3K-3-292-686/2016. June 2, 2016.

Supreme Court of Lithuania. Ruling in civil case no. 3K-3-603-701/2015. November 20, 2015.

Supreme Court of Lithuania. Ruling in civil case no. 3K-3-337/2013. June 26, 2013.

Supreme Court of Lithuania. Ruling in civil case no. 3K-3-206/2005. March 30, 2005.

The Parliament of the Republic of Lithuania. Lietuvos Respublikos medicinos praktikos įstatymas. No. I-1555. September 25. Valstybės žinios. No. 102-2313. October 23, 1996. https://www.e-tar.lt/portal/lt/legalAct/TAR.10E8E285740C/asr.

Doctrine

Bal, Sonny B. "The Expert Witness in Medical Malpractice Litigation." *Clinical Orthopaedics and Related Research* 467, no. 2 (2009): 383–391. https://doi.org/10.1007/s11999-008-0634-4.

Berlin, Leonard. "Medical Errors, Malpractice, and Defensive Medicine: an Ill-fated Triad." *Diagnosis* 4, no. 3 (2017): 133–139. https://doi.org/10.1515/dx-2017–0007.

Cek, Nina. "The Standards of Proof in Medical Malpractice Cases." *Medicine, Law & Society* 13, no. 2 (2020): 173–196.https://doi.org/10.18690/mls.13.2.173-196.2020.

Gao, Pan, Xiaoqiang Li, Ziqin Zhao, Nong Zhang, Kaijun Ma, and Liliang Li. "Diagnostic Errors in Fatal Medical Malpractice Cases in Shanghai, China: 1990–2015." *Diagnostic Pathology* 14, no. 8 (2019): 1–11.https://doi.org/10.1186/s13000-019-0785-5.

Kurz, Stephan D., Viyan Sido, Hermann Herbst, et al., "Discrepancies Between Clinical Diagnosis and Hospital Autopsy: A Comparative Retrospective Analysis of 1,112 Cases." *PLoS One* 16, no. 8 (2021): e0255490. https://doi.org/10.1371/journal.pone.0255490.

Laude, Anne. "La judiciarisation en France, sur la trace des États-Unis?" *Les Tribunes de la santé* 1, no. 26 (2010): 49–59. https://doi.org/10.3917/seve.026.0049.

Lecroy, Kenneth. "The Lie of Primum non Nocere." *American Family Physician* 64, no. 12 (2001): 1942. https://www.aafp.org/pubs/afp/issues/2001/1215/p1942.html.

Madea, Burkhard, and Reinhard Dettmeyer. *Teisės medicinos pagrindai*. Mykolo Romerio universitetas, 2010.

Markulis, Juozas, and Jonas Vytautas Nainys. *Teismo medicina: vadovėlis medicinos institutų studentams*. Mokslas, 1969.

Mažeikienė, Sandra. "Deontologinių ekspertizių etinis, teisinis, teismo medicininis pagrindimas, vertinant profesinius gydytojų nusižengimus ir klaidas." PhD diss., Vilniaus universiteto leidykla, 2020.

Šepec, Miha. "Medical Error – Should it be a Criminal Offence?" *Medicine, Law & Society*, 11, no. 1 (2018): 47–66. https://doi.org/10.18690/2463–7955.11.1.47-66.(2018).

Šivickaitė-Moldarienė, Laura. "Deontologinės ekspertizės išvadų reikšmė Lietuvos baudžiamajame procese." *Teisė* 120 (2021): 104–116, https://doi.org/10.15388/Teise.2021.120.7.

Šivickaitė-Moldarienė, Laura. "Teismo eksperto mokslinės-praktinės ir procesinės kompetencijos vertinimo ypatumai ir pasekmės teisingam teismo sprendimui." PhD diss., Vilnius university, 2024. https://doi.org/10.15388/vu.thesis.602.

Švedas, Gintaras, and Aurelijus Gutauskas. "Patient Autonomy and Criminal Law: A Lithuanian Perspective." *Patient Autonomy and Criminal Law*, edited by Paweł Daniluk. Routledge, 2022. https://doi.org/10.4324/9781003319863.

Other sources

Ferrari, Isabelle. "Le médecin devant le juge penal." In *Rapport annuel de la Cour de cassation* 1999. https://web.archive.org/web/20210517154823/https://www.courdecassation.fr/publications_26/rapport_annuel_36/rapport_1999_91/etudes_documents_93/isabelle_ferrari_5792.html.

Murauskienė, Dovilė. "Baudžiamosios sankcijos medikams: daugiau atrandame ar prarandame?" *Teismai.lt* 5, no 37 (2020): 15–17. https://www.infolex.lt/landing?act=news&Tema=49&Str=69273.

Visuomenės sveikata. "The Hippocratic Oath" 1997, https://web.archive.org/web/20190730220718/http://www.lsmuni.lt/vs-biblioteka/pagalb/hipokrat.htm#virsus.

Abstract

The Relationship Between Criminal and Civil Liability of Doctors: The Example of Lithuania and Other European Countries

The forms of legal liability applicable to physicians and the relationship between them raise important questions in both Lithuanian law and the legal systems of other European countries. First, there is no consensus in either academic or practical discourse as to whether physicians should be subject to criminal liability at all. Accordingly, this article seeks to present the fundamental principles governing the imposition of criminal liability on physicians. To this end, the national legal regulation of various Member States is examined. The article

also identifies the circumstances in which physicians may incur criminal liability, civil liability, or both forms of liability simultaneously. In addition, it discusses the no-fault compensation model and examines the significance of informed patient consent in the context of legal liability. The analysis of the legal regulation in Lithuania and other European countries leads to the conclusion that contemporary law is increasingly oriented not toward punishing physicians for every unsuccessful treatment outcome, but toward ensuring a balance between the protection of patients' rights, fair compensation for harm suffered, and the preservation of physicians' professional autonomy.

Keywords: physicians, criminal liability, civil liability, no-fault compensation model

Santrauka

Gydytojų baudžiamosios ir civilinės atsakomybės santykis: Lietuvos ir kitų Europos valstybių pavyzdžiu

Gydytojams galimos taikyti teisinės atsakomybės rūšys ir jų tarpusavio santykis kelia klausimų tiek Lietuvos, tiek kitų Europos valstybių teisėje. Pirmiausia, bendrai moksliniame ir praktiniame diskurse nesutariama, ar gydytojai apskritai turėtų būti traukiami baudžiamojon atsakomybėn. Todėl yra siekiama pateikti pamatines gydytojo traukimo baudžiamojon atsakomybėn nuostatas. Atitinkamai aptariamas nacionalinis valstybių narių reguliavimas. Taip pat atkleidžiama, kokiais atvejais gydytojams kyla baudžiamoji atsakomybė, kada – civilinė atsakomybė, o kada (jei kyla) abi teisinės atsakomybės rūšys. Kartu yra aptariamas žalos atlyginimo be kaltės modelis ir nurodoma, kokia reikšmę teisinei atsakomybei turi informuoto paciento sutikimas. Atlikta Lietuvos ir kitų Europos valstybių teisinio reguliavimo analizė leidžia teigti, kad šiuolaikinė teisė vis labiau orientuojasi ne į gydytojo baudimą už kiekvieną nesėkmingą gydymo rezultatą, bet į pusiausvyros tarp paciento teisių apsaugos, teisingo žalos atlyginimo ir gydytojo profesinės autonomijos užtikrinimą.

Pagrindiniai žodžiai: gydytojai, baudžiamoji atsakomybė, civilinė atsakomybė, kompensacijos modelis be kaltės nustatymo

Part II



Some Legal Aspects of AI and Neuroscience Application

The Intersections of Criminal, Administrative and Civil Law:
International and National Contexts, pp. 119–130
https://doi.org/10.12797/9788383685328.05

Justas Namavičius
Vilnius University, Faculty of Law
justas.namavicius@tf.vu.lt

Digital Attacks under International Humanitarian and Criminal Law

1. Introduction

Due to Russian aggression against Ukraine, since 2014 the state has been a permanent target of cyber-attacks. In addition to armed hostilities, the aggressor also uses various means of cyber-attacks, from disrupting government websites to disrupting telecommunications, financial services, or critical infrastructure, to attacking power grids. The Ukrainian side, for its part, has also initiated cyberattacks against a wide range of Russian web services, including governmental institutions, financial and news services, and undertakings. A high level of organisation distinguishes the Russian attacks, which involve state actors (for example, the infamous 'Sandworm', operated by military intelligence) as well as private individuals. According to media reports, the current U.S.-Iran conflict is also being accompanied by cyberattacks.

Such attacks raise specific questions regarding the application of International Humanitarian Law (IHL), as well as the possible qualification of IHL violations as war crimes under international customary law. I will set aside the questions of the ICC's jurisdiction or of any hypothetical international ad hoc tribunal, as well as those of the national courts.

In my paper, I will thus discuss the following questions: Firstly, when may a cyber-attack trigger the application of the International Humanitarian Law? (I.) Secondly, the legal status and possible criminal responsibility of persons who commit a cyber-attack (II.). Finally, a brief comment on criminal liability in cases involving AI-based systems (III.) and concluding remarks (IV.).

2. General Aspects of Applicability

To trigger the application of International Humanitarian Law, the cyber-attack must be sufficiently linked to the armed conflict.

The cases that are quite clear are the cases of direct targeting of military infrastructure or other objects in order to reach military goals: for example, the attack on the 'Viasat' satellite network on 24 February 2022 aiming to disrupt Ukrainian military communications (the indirect effect of this attack was the massive disturbance of internet access, also in Western Europe, including about 2,000 wind turbines in Germany). The risk of causing damage to civilian objects (loss of civilian internet access) can raise questions of proportionality and the prohibition of indiscriminate attacks. However, it does not affect the qualification of the aforementioned acts as military hostility. The cyber-attacks often complement the real military operations, such as, for example, the targeting of the website of the City Hall of Odesa during a Russian missile attack in May 2022 or the attack on the website of the Ukrainian energy department during the seizure of the nuclear power plant of Zaporizhzhia by Russian troops.

What is yet not so clear is the attribution of different attacks against the state infrastructure of the involved state, without any geographical closeness to the 'hot zone' of direct hostilities. In such a case, the sufficient nexus to the armed conflict can be defined solely by the subjective purpose of the attack as part of the goals to be achieved in the kinetic armed conflict. In that case, the geographical context does not disappear at all (in my view, the term 'deterritorialization' of the World Wide Web is misleading). In fact, in the latter case, the affected territory can be broader than in case of kinetic activities, particularly given that cyberattacks can also be initiated from third countries.

One of the most discussed questions is determining the threshold for triggering the application of IHL, in other words, the scope of the term 'attack'. The term is defined in Article 49(1) AP I[1] as an 'act of violence against the adversary, whether in offence or defence'. It is widely recognised that cyber--attacks can constitute an act of violence and an 'armed attack' under Article 51 of the UN Charter.[2] The decisive factor here is not the similarity of cyber tools

1 Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts, Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977.

2 Charter of the United Nations, June 26, 1945.

to common kinetic weapons, but the scope of their effects. The thereto related question is the prohibition on attacking civilian objects under Article 51(2) of the AP I. According to some authors, any cyber operation targeting civilians or critical infrastructure, even without visible physical damage, should be forbidden by the IHL.[3]

On the one hand, such an opinion may be convincing because of its approach to provide the maximum level of protection to civilian objects during armed conflict. On the other hand, account should be taken of the corresponding military ('Hague-Law') aspect of the application of the rules of the IHL: One who qualifies as a participant of hostility can also be a legitimate target of the potential countermeasure, also of the kinetic character. Besides, in order for criminal liability for war crimes under international customary law to arise, a considerable degree of unlawfulness is required. Based on the aforementioned points, mainstream literature prefers a conservative definition of the term 'attack' if the cyber operation is intended to result in injury or death of civilians or the destruction of civilian objects.[4]

Such a requirement would not be fulfilled by restricting internet access, nor by destroying or damaging the data infrastructure without posing a significant danger to the civilian population, by placing propaganda content, or by leaking data. However, the examples that fall under the aforementioned definition include interference with the functionality of health services, energy infrastructure, or the food or water supply. The delimitation can be difficult and

3 Georgia Beatty, "War Crimes in Cyberspace: Prosecuting Disruptive Cyber Operations under Article 8 of the Rome Statute," *The Military Law and the Law of War Review* 58, no. 2 (2020): 230–234; overview about the discussion Joanna Jarose, Reconsidering the Definition of 'Attack' and 'Damage' in Cyber Operations During Armed Conflict: Emerging Subsequent State Practice," *The Adelaide Law Review* 44, no. 2 (2023): 328–337; Eric Talbot Jensen, "Computer Attacks on Critical National Infrastructure: A Use of Force Invoking the Right of Self-Defense," *Stanford Journal Of International Law* 38 (2002): 221-230; Michael N. Schmitt, ed., *Tallin Manual 2.0 On the International Law Applicable to Cyber Operations* (Cabridge University Press, 2017), 417–418.

4 Laurie R. Blank, "International Law and Cyber Threats from Non-State Actors," *International Law Studies* 89, no. 406 (2013): 415; Anne-Laure Chaumette, "International Criminal Responsibility of Individuals in Case of Cyberattacks," *International Criminal Law Review* 18, no. 1 (2018): 7–8, 11; Knut Dörmann, "Applicability of the Additional Protocols to Computer Network Attacks," in *International Expert Conference on Computer Network Attacks and the Applicability of International Humanitarian Law, 17–19 November 2004, Stockholm, Sweden: Proceedings of the Conference*, ed. Karin Byström (Swedish National Defence College 2005), p. 3; Paul A. L. Ducheine, "Military Cyber Operations," in *The Handbook of the International Law of Military Operations*, 2nd ed., ed. Terry D. Gill and Dieter Fleck (Oxford University press, 2015), 471–475; Schmitt, *Tallin Manual*, 415–416.

may require additional criteria, such as the extent of damage or the number of attacks, the close nexus to the kinetic armed operation, and the status of the persons committing an attack. However, the application of the narrow definition of the term 'attack' may not always provide satisfactory results, for example, if the systematic attacks on the common state infrastructure, such as the financial or business sectors, government websites, and public broadcasts, have a systematic and highly exhausting character for the whole of society. It is also worth asking whether, for example, the loss of a large amount of valuable data resulting from a cyberattack should not be afforded the same level of protection as damage to physical civil infrastructure. However, the situations of various hostile actions below the threshold of 'armed attack' are well-known in state practice and can be addressed using the same countermeasures.

Furthermore, setting the criteria for determining damage – decoupled – from the physical world would create considerable legal uncertainty regarding the threshold for an armed attack. In other words, applying the law of international armed conflict too hastily to a wide variety of international incidents would introduce a great deal of uncertainty into this branch of law and, in a sense, devalue it. Incidentally, when it comes to criminal jurisdiction, the principle of protecting state interests applicable in such cases is inherently much more flexible than the rather complex process of proving and classifying war crimes under the principle of universality. The destruction or disruption of data infrastructure can also have legal implications under the IHL if the cyber-attack occurs in the context of a kinetic conflict.

3. Involvement of the Non-State Actors

I now turn to the second question mentioned at the beginning of my paper: the status of the persons involved in the cyberattacks. In some cases, such persons may be integrated into the military forces of the conflicting state. In such a case, they may have combatant status. However, attributing the classical requirements, such as distinctive signs or the visible carrying of weapons, is not practicable in the context of a cyber-attack and appears obsolete. The only remaining criterion is thus the integration of the acting person into a hierarchical command structure.

It should be stressed that the ubiquity of technical or geographical possibilities for cyber-attacks, compared to the weapons of 'kinetic war', greatly widens the circle of possible actors. Apart from the military personnel, cyber-attacks intended to achieve military goals in armed conflict may be initiated by civilians,

more or less closely organised into specific groups, by private enterprises, and by entities operating from the territories of third states. According to the common rules of the international humanitarian law, civilians do not obtain the combatant privilege but can be targeted if they take a direct part in hostilities (Art. 51(3) AP I).[5]

In this context, civilians may also be responsible for international war crimes if they injure the protected persons or objects. However, the most discussed aspect is, thereby, the definition of the 'direct participation in hostilities'. The Interpretative Guidance of the International Committee of the Red Cross recommends the following criteria: the attack should affect a military target of a party of an armed conflict or to inflict death, injury or destruction on protected persons or objects, furthermore, the element of direct causation should be present as well as the so called 'belligerent nexus', which means the aim to support one party of the conflict to the detriment of the other.[6]

In the context of cyber-attacks, the question may arise of where to draw the line between the potentially very broad group of unlawful combatants and for potential targets. One possible approach is the restrictive interpretation of the elements of the definition of 'direct participation'. This approach follows the aforementioned Interpretative Guidance, which requires a high threshold of injury to protected objects, likely even higher than that required under the definition of the 'armed attack'.[7]

The threshold may, for example, not be reached if the single person commits only a single act of the organised DDoS attack (in this regard, we may recall the similar discussion in Germany several years ago regarding attacks against the 'Lufthansa' website). Another approach could be to search for parallel criteria for the distinction between combatants and civilians. In the case of cyber activities, where the state does not necessarily hold the monopoly of the equipment and know-how of the means, like in classical warfare, the practicable way to determine the direct participation in the hostilities is the level of integration of the person in the structure of the armed forces (in other words,

5 Dörmann, "Applicability of the Additional Protocols," 8–9; Elizabeth Mavropoulou, "Targeting in the Cyber Domain: Legal Challenges Arising from the Application of the Principle of Distinction to Cyber Attacks," *Journal of Law & Cyber Warfare* 4, no. 2 (2015): 79–91; Michael N. Schmitt, Wired Warfare: Computer Network Attack and *Jus in Bello*," *International Review of the Red Cross* 84, no. 846 (2002): 383–384.

6 Nils Melzer, *Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (International Committee of the Red Cross, 2009), p. 46.

7 See also Anna Greipl, *International Humanitarian Law and the Growing Involvement of Civilians in Cyber Operations and other Digital Activities During Armed Conflict* (ICRS, Geneva Academy of International Humanitarian Law and Human Rights, 2025), 12–14, who, in effect, recognize only the targeting of military objectives as direct participation in hostilities.

the closeness of the person to the armed forces). In my opinion, such a criterion could be discussed as the main element in the assessment of the question of whether the person or the group of persons directly participates in the hostilities or not. If the state exercises permanent and sufficient control over the person or the group, it can be targeted irrespective of whether the persons belong to a military unit, are private contractors, or are members of some government--associated organisation. On the contrary, if the person participates as a private person without any closer organisational nexus to the party to the conflict, such a person should not be subject to international humanitarian law and cannot be targeted by military means.

Also, any potential criminal responsibility of such a person for an international crime should be limited to the role of a secondary participant, for example, one who aids the main perpetrator. If single attacks on civilians are initiated or guided by state actors, depending on the specific circumstances of the case, it could be considered whether state actors could be regarded as indirect perpetrators.

4. Artificial Intelligence-Operated Systems

Concluding my paper, some general remarks should be added about the questions of criminal responsibility for the violations of the rules of IHL by using artificial intelligence (AI) in cyber warfare. In the following, I set aside the less problematic case, if the human makes a decision supported by AI. As is well known, the use of AI has a specific aspect: decisions to act (or not to act) in certain circumstances can be made autonomously, without further control by a human being who activates such a system. The more pressing issue can arise from the use of deep-learning systems whose functioning may be beyond the developer's control and understanding. Some authors also argue that because of the issues of causality and means, the common international criminal law is inadequate for AI-infused warfare.[8]

In my opinion, the aforementioned legal challenges can be addressed to a certain extent by applying the common rules of criminal imputation. In brief, a few points:

As long as a human being uses/activates the AI system as an instrument to achieve human goals and as long as AI is not recognised as an autonomous

[8] Yatish Ojha, "Artificial Intelligence in Armed Conflict: Perspectives from International Humanitarian Law," *Unity Journal* 6, no. 1 (2025): 44.

subject of law, a person remains responsible as the source of objective causality. This holds regardless of whether the decision-making process of such a system can be understood by human beings in individual cases.

The difficult questions may arise from the requirements of *mens rea*: the perpetrator initiates an AI-based cyber operation, but may not foresee the entire scope of possible effects. The general part of criminal law also allows imputation in cases where the acting person calculates the possible risks of his conduct (*dolus generalis*), for example, the potential indiscriminate damage to civilian objects.[9] The problem is that Art. 30 of the Rome Statute knows only two forms of mental elements: (volitional) direct intent or *dolus directus* of the first degree and (cognitive) knowledge as *dolus directus* of the second degree, i.e. *person means to cause that consequence or is aware that it will occur in the ordinary course of events*. The cases of indirect intent (*dolus eventualis*) or of the 'willful blindness' do not fall under the scope of the ICC Statute.[10] This provision entails a historically unconvincing and illogical narrowing of the scope of the subjective element of the offense. A person who, in any event, acts with full awareness of the risks or takes into account the possibility of their actions failing, is given preferential treatment.[11] Should the future use of AI-based systems, amongst other things, be deliberately kept unpredictable, this will, in many cases, also lead to gaps in criminal liability, at least under international criminal law. However, it is a general problem of guilt imputation, not just related to cyber-attacks.

Specific regulations may be needed in cases of negligence when an AI-operated system causes unforeseen damage. Precisely owing to the potential risks associated with an autonomous system, it makes sense to broaden the

---

9 The figure of *dolus generalis* regarding the subjective element of the offence was used in the reasoning of the District Court of the Hague on 17 November 2022 (No 09/748004-19) in the MH17 case: Although the (remote) perpetrators believed they were targeting a Ukrainian military aircraft, the Court nevertheless found that they had intended to kill all of the 298 passengers, arguing that the perpetrators did not enjoy the combatant privilege and were therefore not authorised to shoot down any aircraft. The Court saw the problem that it may overstretch the evaluation of the actual horizon of knowledge; nevertheless, it found the defendants guilty of murder on account of the grave consequences. The text of the judgment: https://uitspraken.rechtspraak.nl/details?id=ECLI:NL:RBDHA:2022:14037 (accused Igor Girkin).

10 International Criminal Court, case of The Prosecutor v. Thomas Lubanga Dyilo, no. ICC-01/04-01/06-3121-Red, December 1, 2014, paras 437-450.

11 Carl-Friedrich Stuckenberg, "Vorsatz im Völkerstrafrecht," *Zeitschrift für Internationale Strafrechtsdogmatik* 12 (2018): 534–535, who rightly points out that attempts in the literature to bridge this gap by incorporating the more flexible definition found in customary international law ultimately undermine the very purpose of explicit regulation.

scope of criminal responsibility in international criminal law: a person who deliberately relinquishes control over a particular chain of events cannot claim that the outcome cannot be attributed to them. Also, in the long term, depending on technological progress in AI-based systems, a practical need may arise for the rules of the more abstract scope, such as similar to the well-known prohibitions on indiscriminate weapons.

5. Resume

The assessment of cyberattacks under international humanitarian law initially took a fairly broad approach, as exemplified by the U.S. Department of Defense's deliberations during the Kosovo War on whether an attack on the Serbian banking sector could constitute a war crime.[12] Recent literature, however, tends to favour a rather narrow effect-based cognitive approach of the term of an 'attack', although such an approach is not without its critics. So, in the end, an open question remains whether we are not, in a sense, going in circles by returning to the context of kinetic military conflict, so that the law of armed conflict applies to cyberattacks only if they accompany and complement conventional military operations. However, technological advances in AI-based systems may lead to a partial re-evaluation of conventional rules.

6. Conclusions

1. To trigger the application of IHL, the cyber-attack must fulfil the criteria of the term 'attack', defined in Article 49(1) AP I as an 'act of violence, whether in offence or defence'. This article argues, for the sake of legal certainty, to adopt the narrower approach, which requires actual (kinetic) effects on persons or objects protected under IHL. The destruction or disruption of data infrastructure can also have legal implications under the IHL if the cyber-attack occurs in the context of a kinetic conflict.
2. The ubiquity of non-state actors' participation in cyberconflicts may increase the risk of them being targeted as unlawful combatants. In

12 See Julian Borger, "Pentagon Kept the Lid on Cyberwar in Kosovo," *The Guardian*, November 9, 1999, https://www.theguardian.com/world/1999/nov/09/balkans. Also worth a look today: Department of Defense Office of General Counsel, An Assessment of International Legal Issues in Information Operations, May 1999.

the case of cyber activities, where the state does not necessarily hold the monopoly of the equipment and know-how of the means, like in classical warfare, one of the main elements in the assessment whether the person or the group of persons participates in the hostilities may be the permanent and sufficient control by the conflicting state over the person or the group.

3. The use of deep learning AI systems in cyberconflicts may lead to a partial re-evaluation of conventional rules regarding the subjective element of the offence. In the long term, a practical need may arise for the rules of a more abstract scope, similar to the well-known prohibitions on indiscriminate weapons.

References

Beatty, Georgia. "War Crimes in Cyberspace: Prosecuting Disruptive Cyber Operations under Article 8 of the Rome Statute," *The Military Law and the Law of War Review* 58, no. 2 (2020), pp. 209–239. https://doi.org/10.4337/mllwr.2020.02.17.

Blank, Laurie R. "International Law and Cyber Threats from Non-State Actors." *International Law Studies* 89, no. 406 (2013), pp. 406–437.

Borger, Julian. "Pentagon Kept the Lid on Cyberwar in Kosovo." *The Guardian*, November 9, 1999. https://www.theguardian.com/world/1999/nov/09/balkans.

Chaumette, Anne-Laure. "International Criminal Responsibility of Individuals in Case of Cyberattacks." *International Criminal Law Review* 18, no. 1 (2018): 1–35. https://doi.org/10.1163/15718123–01801004.

Department of Defense Office of General Counsel. An Assessment of International Legal Issues in Information Operations. May 1999.

District Court of the Hague. Judgment no. 09/748004-19. November 17, 2022. https://uitspraken.rechtspraak.nl/details?id=ECLI:NL:RBDHA:2022:14037.

Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I). 8 June 1977.

Dörmann, Knut. "Applicability of the Additional Protocols to Computer Network Attacks." In *International Expert Conference on Computer Network Attacks and the Applicability of International Humanitarian Law, 17–19 November 2004, Stockholm, Sweden: Proceedings of the Conference*, edited by Karin Byström. Swedish National Defence College, 2005.

Ducheine, Paul A. L. "Military Cyber Operations." In *The Handbook of the International Law of Military Operations*, 2nd ed., edited by Terry D. Gill and Dieter Fleck. Oxford University press, 2015.

Greipl, Anna. *International Humanitarian Law and the Growing Involvement of Civilians in Cyber Operations and Other Digital Activities During Armed Conflict*. ICRS, Geneva Academy of International Humanitarian Law and Human Rights, 2025.

International Criminal Court. Case of The Prosecutor v. Thomas Lubanga Dyilo. No. ICC-01/04-01/06-3121-Red. December 1, 2014.

Jarose, Joanna. "Reconsidering the Definition of 'Attack' and 'Damage' in Cyber Operations During Armed Conflict: Emerging Subsequent State Practice." *The Adelaide Law Review* 44, no. 2 (2023): 317–338.

Jensen, Eric Talbot. "Computer Attacks on Critical National Infrastructure: A Use of Force Invoking the Right of Self-Defense." *Stanford Journal of International Law* 38, (2002): 207–240.

Mavropoulou, Elizabeth. "Targeting in the Cyber Domain: Legal Challenges Arising from the Application of the Principle of Distinction to Cyber Attacks." *Journal of Law & Cyber Warfare* 4, no. 2 (2015): 23–93. https://ssrn.com/abstract=4067446.

Melzer, Nils. *Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*. International Committee of the Red Cross, 2009.

Ojha, Yatish. "Artificial Intelligence in Armed Conflict: Perspectives from International Humanitarian Law." *Unity Journal* 6, no. 1 (2025): 34–47. https://doi.org/10.3126/unityj.v6i1.75547.

Schmitt, Michael N. "Wired Warfare: Computer Network Attack and *Jus in Bello*." *International Review of the Red Cross* 84, no. 846 (2002): 365–399.

Schmitt, Michael N., ed. *Tallin Manual 2.0 On the International Law Applicable to Cyber Operations*. Cabridge University Press, 2017.

Stuckenberg, Carl-Friedrich. "Vorsatz im Völkerstrafrecht." *Zeitschrift für Internationale Strafrechtsdogmatik* 12 (2018): 524–535.

United Nations. United Nations Charter. June 26, 1945.

Abstract

Digital Attacks under International Humanitarian and Criminal Law

Modern armed conflicts are almost always accompanied by cyberattacks, as has been particularly evident in Russia's military aggression against Ukraine since 2014. They have also become a daily occurrence in the so-called 'hybrid' war against Western states. This article discusses the extent to which international humanitarian law of armed conflict applies to digital attacks. Preference is given to a narrower view: a cyberattack must either lead to real consequences for persons or objects protected under the law of armed conflict, or it must be part of a kinetic attack. Non-state actors are also frequently involved in cyber operations, which increases the risk of becoming unlawful combatants and, consequently, targets of (not necessarily solely digital) retaliatory measures. One key criterion for determining whether private persons are 'directly participating in hostilities' could be whether the state involved in the conflict consistently controls and directs their actions. The use of artificial intelligence in cyber weapons may pose specific challenges in the future, particularly regarding autonomous ('deep learning') machines, which are only partially controlled and understood by the individuals operating them. The potential complexity of the causation events raises the question of whether the concept of the subjective element, which is currently in force in international criminal law, is sufficient to protect civilians effectively. In addition, over time, there may be a need for more general rules similar to the existing bans on non-discriminatory weapons.

Keywords: AI-operated systems, cyber-attacks, International Criminal Law, International Humanitarian Law, *mens rea*, non-state actors

Santrauka

Skaitmeninės atakos pagal tarptautinę humanitarinę ir baudžiamąją teisę

Šiuolaikinius ginkluotis konfliktus beveik visais atvejais lydi skaitmeninės atakos, ką ypač parodė nuo 2014 m. Rusijos vykdoma karinė agresija prieš Ukrainą. Taip pat jos yra tapusios taip vadinamo "hibridinio" karo prieš Vakarų valstybes kasdienybe. Straipsnyje aptariami klausimai, kokia apimtimi tarptautinė humanitarinė ginkluoto konflikto teisė galioja skaitmeninėms atakoms. Pirmenybė teikiama siauresniam požiūriui, kad kibernetinė ataka arba turi vesti prie realių padarinių ginkluoto konflikto teisės saugomiems asmenims ar objektams, arba

ji turi būti kinetinio konflikto dalis. Kibernetiniuose veiksmuose taip pat dažnai dalyvauja ir privatūs asmenys, kas sukelia padidintas rizikas tapti neteisėtais kombatantais ir tuo pačiu tapti (nebūtinai vien skaitmeninių) atsakomųjų priemonių taikiniais. Vienas pagrindinių kriterijų, nustatančiam, ar privatūs asmenys "tiesiogiai dalyvauja ginkluotos kovos veiksmuose", galėtų būti aplinkybė, ar konfliktuojanti valstybė pastoviai kontroliuoja ir valdo jų veiksmus. Kitas specifines problemas ateityje gali kelti dirbtinio intelekto panaudojimas naudojant kibernetinius ginklus, ypač autonominių ("*deep learning*") mašinų atžvilgiu, kurias jas naudojantys asmenys tik iš dalies kontroliuoja bei suvokia jų veikimą. Dėl galimo priežastingumo grandinių kompleksiškumo kyla klausimas, ar iki šiol tarptautinėje baudžiamojoje teisėje galiojanti subjektyviosios pusės samprata yra pakankama efektyviai civilių apsaugai. Be to, ilgainiui gali atsirasti poreikis bendresnėms taisyklėms, analogiškoms šiuo metu žinomiems nediskriminacinių ginklų draudimams.

Pagrindiniai žodžiai: DI valdomos sistemos, kibernetinės atakos, tarptautinė baudžiamoji teisė, tarptautinė humanitarinė teisė, tyčia, nevalstybinės organizacijos

The Intersections of Criminal, Administrative and Civil Law:
International and National Contexts, pp. 131–147
https://doi.org/10.12797/9788383685328.06

Neringa Gaubienė
Vilnius University, Faculty of Law
neringa.gaubiene@tf.vu.lt

Kristina Pranevičienė
Vilnius University, Faculty of Law
kristina.praneviciene@gmail.com

AI Literacy under the EU AI Act: Governance, Implementation Challenges, and the Digital Omnibus Recalibration

1. Introduction

The European Commission describes Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 laying down harmonised rules on artificial intelligence (Artificial Intelligence Act, AI Act)[1] as the first comprehensive legal framework on artificial intelligence (AI), and its implementation timeline confirms that AI literacy was among the earliest obligations to become applicable:[2] prohibited practices and AI literacy duties started to apply on 2 February 2025, long before the rest of the requirements.[3]

1 The European Parliament, Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 Laying Down Harmonised Rules on Artificial Intelligence and Amending Regulations (EC) No 300/2008, (EU) No 167/2013, (EU) No 168/2013, (EU) 2018/858, (EU) 2018/1139 and (EU) 2019/2144 and Directives 2014/90/EU, (EU) 2016/797 and (EU) 2020/1828 (Artificial Intelligence Act), Official Journal of the European Union, 2024/1689, July 12, 2024, accessed May 16, 2026, https://eur-lex.europa.eu/eli/reg/2024/1689/oj.

2 "AI Act," European Commission, accessed May 16, 2026, https://digital-strategy.ec.europa.eu/en/policies/regulatory-framework-ai.

3 Under the original AI Act timeline, most obligations relating to high-risk AI systems were scheduled to apply from 2 August 2026. Subsequently, the European Commission launched

The legislation treats human competence as an enabling condition for safe and lawful AI use, emphasising that persons dealing with AI systems should possess the necessary skills, knowledge, and understanding to make informed decisions and be aware of both the opportunities and risks posed by AI.[4]

This article analyses the legal framework established by Article 4, Article 3(56), Article 26, Article 53, and Recital 20 of the AI Act, as well as the changes introduced through the Omnibus initiative,[5] together with the related implementation challenges and the Lithuanian perspective. The central legal question addressed in this article is the following: what must an organisation, whether public or private, actually do before it can credibly claim to have achieved a sufficient level of AI literacy under the AI Act?

One of the greatest challenges arises from the rapidly evolving legislative and regulatory environment surrounding the AI Act. Before the Digital Omnibus initiative,[6] this challenge was already amplified by the structure of Article 4 itself. The provision combines a conduct-oriented obligation to 'take measures' with an outcome-oriented reference to achieving a 'sufficient level' of AI literacy, while simultaneously softening the standard through the phrase 'to their best extent'. Given that the AI Act is a directly applicable regulation, this drafting choice gives Article 4 genuine legal significance, yet also creates uncertainty regarding the scope, intensity, evidence, and enforcement of compliance obligations.

The European Commission's AI Office, in its Questions and Answers guidance,[7] adopted a flexible approach and explicitly rejected a one-size-fits-all

---

the 'Omnibus' simplification initiative in response to concerns regarding regulatory burden and implementation readiness. This triggered broader political discussions concerning the postponement and recalibration of certain AI Act obligations, including through a proposed 'stop-the-clock' approach and subsequent political agreements amending the implementation timeline.

4 Recital 20 of the AI Act states that AI literacy should equip providers, deployers and affected persons with the necessary notions to make informed decisions regarding AI systems.

5 A political agreement on the AI Omnibus was reached on 7 May 2026, but there is not yet an enacted amending regulation in force. The analysis below therefore treats the original Article 4 in Regulation (EU) 2024/1689 as the currently binding text, while also examining the likely direction of reform.

6 *On 19 November 2025, the European Commission published its highly anticipated Digital Omnibus – a sprawling package of new reform proposals which aim to simplify and streamline the EU's digital rulebook (or digital acquis). The proposals aim to ensure that the EU's digital rules remain fit for supporting innovation and growth*, in "EU Digital Omnibus: At a Glance," Eversheds Sutherland, accessed May 17, 2026, https://www.eversheds-sutherland.com/pl/poland/insights/eu-digital-omnibus-at-a-glance.

7 "AI Literacy – Questions & Answers," European Commission, accessed May 16, 2026, https://digital-strategy.ec.europa.eu/en/faqs/ai-literacy-questions-answers.

understanding of AI literacy training. At the same time, the subsequent Digital Omnibus reform introduced proposals to simplify and partially recalibrate the original AI literacy obligation, including shifting from a stronger obligation to ensure a 'sufficient level' of AI literacy towards a softer obligation focused on supporting or promoting AI literacy improvements. This development risks weakening the normative ambition of Article 4 precisely in the area where the original text was most innovative: embedding human competence, informed judgement, and organisational awareness into the legal architecture of trustworthy AI governance. Nevertheless, despite the proposed changes introduced through the Digital Omnibus initiative, the practical and legal need to achieve a sufficient level of AI literacy remains highly relevant, particularly for ensuring the effective, safe, and trustworthy deployment and use of AI systems.

The method used here is doctrinal legal analysis. The article analysis Article 4 in close relation to Article 3(56), Recital 20, Article 53 and Article 99 of the AI Act, then places those provisions against the Commission's implementation materials, especially the AI Office Q&A, the AI literacy repository, and the current reform documents on the Digital Omnibus.

2. The Legal Meaning of AI Literacy

The legal analysis in this article is contextualised through AI literacy scholarship and policy frameworks. Long and Magerko define AI literacy as a set of competencies that enables individuals to critically evaluate AI technologies; communicate and collaborate effectively with AI; and use AI as a tool online, at home, and in the workplace.[8] Ng and colleagues conceptualise AI literacy through four dimensions: knowing and understanding, using and applying, evaluating and creating, and ethical issues.[9] Other researchers further emphasise that AI literacy intersects with digital literacy, data literacy, computational thinking, and AI ethics, and that assessment remains methodologically unsettled.

The AI Act provides a specific legal definition of AI literacy in Article 3(56). According to this provision, AI literacy means *the skills, knowledge and understanding that allow providers, deployers and affected persons, taking into*

8 Duri Long and Brian Magerko, "What Is AI Literacy? Competencies and Design Considerations," in *CHI '20: Proceedings of the 2020 CHI Conference on Human Factors in Computing Systems* (Association for Computing Machinery, 2020), https://doi.org/10.1145/3313831.3376727.

9 Davy Tsz Kit Ng et al., "Conceptualizing AI Literacy: An Exploratory Review," *Computers and Education: Artificial Intelligence* 2 (2021): 100041, https://doi.org/10.1016/j.caeai.2021.100041

account their respective rights and obligations in the context of [the AI Act], to make an informed deployment of AI systems, as well as to gain awareness about the opportunities and risks of AI and possible harm it can cause. Several important elements can be revealed from this definition. First, AI literacy is not limited to technical know-how; it encompasses understanding rights and obligations under the AI Act, indicating a blend of legal/regulatory awareness and technical competence. It also explicitly includes both providers (those who develop or place AI systems on the market) and deployers (those who use or implement AI systems in practice), as well as 'affected persons'. This last term suggests that even individuals impacted by AI decisions (such as consumers or citizens) are within the scope of who should ideally possess some AI literacy.[10] In essence, AI literacy in the EU's legal context is a multi-faceted concept aimed at empowering all stakeholders of an AI system to engage with it knowledgeably and safely. Recital 20 of the AI Act explains that AI literacy serves not only benefits and innovation, but also the protection of fundamental rights, health and safety, democratic control, proper compliance, and correct enforcement. In practical terms, Recital 20 indicates that an AI-literate person should be capable of correctly applying the technical aspects of AI systems, i.e., understanding how to use them appropriately within their intended scope; taking appropriate measures when using AI, such as following safety or ethical guidelines; interpreting AI outputs correctly, recognising the limitations or uncertainties of AI-generated results; and ensuring compliance with the AI Act, by being aware of the legal requirements and restrictions applicable to the AI system in question.

Article 53 performs a different but equally important function. Providers of general-purpose AI models must draw up technical documentation, provide downstream system providers with information and documentation that enable them to understand the model's capabilities and limitations and comply with their own AI Act obligations, put in place a copyright compliance policy, and publish a sufficiently detailed summary of the content used for training. Those are not literacy obligations as such, but they create the informational infrastructure on which literacy efforts depend.

The recently proposed Digital Omnibus on AI introduces a significant recalibration of the AI Act's implementation model in response to emerging implementation challenges, particularly with regards to proportionality,

[10] DigitalEU. "Third AI Pact Webinar on AI Literacy." Webinar, February 20, 2025. Posted by European Commission. YouTube, 1:20:20. https://www.youtube.com/watch?v=Dyf4ZVts9HY.

administrative burden, and regulatory simplification.[11] The initiative acknowledges that the practical implementation of the AI Act has proven more complex than initially anticipated, especially due to delays in harmonised standards, conformity assessment structures, and national governance mechanisms. As the proposal itself notes, stakeholder consultations revealed that compliance obligations risk becoming 'heavier than expected', particularly for SMEs and smaller market actors. The Omnibus initiative therefore seeks to preserve the AI Act's core objectives while introducing targeted simplifications intended to facilitate implementation and reduce unnecessary duplication.

One of the most important proposed changes concerns Article 4 on AI literacy. The original wording imposed an obligation on providers and deployers to 'ensure' a sufficient level of AI literacy among staff and persons operating AI systems on their behalf. The Omnibus proposal softens this obligation considerably. Instead of imposing what stakeholders perceived as a stringent compliance duty, the amended text would require organisations merely to *take measures to support the development of AI literacy* among relevant persons. The proposal explicitly justifies this shift by arguing that the previous formulation created disproportionate compliance burdens, especially for smaller enterprises, while AI literacy should instead function as a strategic organisational objective rather than a sanction-oriented obligation. At the same time, the proposal places stronger emphasis on supportive governance mechanisms, encouraging the Commission and Member States to provide training opportunities, informational resources, and exchanges of best practices.

More broadly, the Omnibus initiative reflects a transition from a rigid compliance-centred approach towards a more flexible and innovation-oriented regulatory framework. The proposal repeatedly emphasises proportionality, simplification, and the reduction of overlapping obligations, particularly for SMEs and small mid-cap enterprises.

Seen in that light, Article 4 operates as a connective provision. It links legal compliance to human capability across the AI value chain. That also explains why Recital 20 refers not only to providers and deployers, but also to affected persons: the Regulation understands literacy as part of the broader social architecture. Article 4's organisational addressees are narrower than the broader

[11] European Commission, Proposal for a Regulation of the European Parliament and of the Council Amending Regulations (EU) 2024/1689 and (EU) 2018/1139 as Regards the Simplification of the Implementation of Harmonised Rules on Artificial Intelligence (Digital Omnibus on AI), COM(2025) 836 final, November 19, 2025, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52025PC0836.

justice-oriented aims expressed in the definition and recital, but those aims help explain why the provision should be interpreted purposively rather than minimally.

The practical content of the duty is also more differentiated than a simple 'everyone must be trained' formula. The AI Office Questions and Answers (AI Office Q&A)[12] confirms that literacy measures can legitimately vary between people with different knowledge, experience, education, and training; that technically qualified employees may in some cases already possess enough background competence, but still require specific, legal, and ethical orientation; and that 'other persons' may include service providers or contractors operating on the organisation's behalf, depending on the system and the risk involved.

This leads to several important implications. First, AI literacy is relational rather than abstract: it is defined by role, rights, obligations, and context. Secondly, it is broader than mere technical familiarity. A compliant organisation must therefore consider not just whether staff can click the right buttons, but whether they understand what the system does, where it may fail, what are the are the capabilities of AI, who may be affected, and what legal and ethical consequences follow from its use. The AI Office Q&A[13] reinforces this by stating that, at a minimum, organisations should ensure a general understanding of what AI is, how it works, what AI is used in the organisation, and what its opportunities and dangers are; they should then tailor literacy actions to their role as provider or deployer, the risk level of the systems at issue, staff profiles, and the purpose and sector of use.

Long and Magerko's competency-based approach[14] and Ng et al.'s four-dimensional aspects (i.e., know and understand, use and apply, evaluate and create, and ethical issues)[15] both reject a narrow, purely technical reading of literacy. Yim's review further places AI literacy at the intersection of digital literacy, data literacy, computational thinking, and AI ethics, underscoring its transdisciplinary character.[16] Together, these approaches support the conclusion that the AI literacy requirement under the AI Act cannot sensibly be satisfied through technical knowledge alone.

---

12 Literacy – Questions & Answers."

13 European Commission, Literacy – Questions & Answers."

14 Long and Magerko, "What Is AI Literacy? Competencies and Design Considerations," 1–16.

15 Ng et al., "Conceptualizing AI Literacy: An Exploratory Review."

16 Iris Heung Yue Yim, "A Critical Review of Teaching and Learning Artificial Intelligence (AI) Literacy: Developing an Intelligence-Based AI Literacy Framework for Primary School Education," *Computers and Education: Artificial Intelligence* 7 (2024): 100319, https://doi.org/10.1016/j.caeai.2024.100319.

Educational policy frameworks point in UNESCO's AI Competency Framework for Students identifies 12 competencies across a human-centred mindset, ethics of AI, AI techniques and applications, and AI system design, structured across the progression levels 'Understand', 'Apply', and 'Create'.[17] This framework is highly instructive because it demonstrates that technical, ethical, design, and judgement-based capacities are inseparable and form a reliable AI literacy profile.

Academic literature increasingly recognises ISO/IEC 42001:2023 as a significant governance framework for AI compliance and organisational preparedness. McIntosh et al. identify ISO/IEC 42001 as the first international AI management system standard specifically designed to address AI governance, risk management, and regulatory compliance in organisational environments.[18] In this context, the standard is also relevant to AI literacy, as it incorporates organisational requirements relating to competence, awareness, training, communication, and documented information, thereby reinforcing the idea that effective AI governance depends not only on technical safeguards, but also on the knowledge, understanding, and preparedness of the individuals involved in the development, deployment, oversight, and use of AI systems.

3. Implementation and Enforcement

The most authoritative practical guidance currently available is the AI Office's Q&A guidance, and its approach is notably flexible. The European Commission does not impose strict requirements for compliance with Article 4, nor does it establish a single benchmark for what constitutes a sufficient level of AI literacy. The guidance does not require a mandatory course format, checklist, formal certification schemes, or the appointment of a dedicated AI officer for compliance purposes. Instead, it accepts differentiated learning pathways adapted to organisational context and merely suggests that organisations maintain internal records of training, awareness, or guidance initiatives. This indicates that AI literacy under the AI Act is not conceived as a standardised credentialling regime, but rather as a context-dependent responsibility.

---

17 Fengchun Miao, Kelly Shiohira and Natalie Lao, *AI Competency Framework for Students* (UNESCO, 2024), https://doi.org/10.54675/JKJB9835.

18 Tristan R. McIntosh, et al., "From COBIT to ISO 42001: Evaluating Cybersecurity Frameworks for Opportunities, Risks, and Regulatory Compliance in Commercializing Large Language Models." *Computers & Security* 144 (2024): 103964. https://doi.org/10.1016/j.cose.2024.103964.

That flexibility is sensible, but it leaves organisations and institutions with a serious evidential problem: how can they determine when their level of AI literacy is adequate to meet the expectations and obligations arising under the AI Act? Current academic literature does not yet provide a single stable answer to this question. Koch and colleagues note that the AI literacy measurement remains methodologically unsettled, as the majority of existing assessment instruments rely on self-report questionnaires rather than performance-based evaluations.[19] They argue that this raises important concerns regarding the objectivity, reliability, and validity of AI literacy measurements, particularly when such instruments are used to assess actual AI-related competences or to support organisational decision-making; their work on the Meta AI Literacy Scale aims to improve validity and shorten measurement tools for practical use. Zhou and colleagues, in a systematic review of K-12 AI literacy and competency, argue that existing definitions should be expanded to include self-reflection and emotional aspects, while also showing how content, instruction, and assessment vary widely.[20] The law, meanwhile, expressly does not require organisations to measure employee knowledge. The result is that 'sufficiency' under Article 4 – especially following the Omnibus proposal replacing the obligation to ensure a sufficient level of AI literacy with a duty to 'take measures to support the development of AI literacy' – cannot plausibly be reduced to a universal test score. A more defensible reading is that organisations must be able to show a suitable process for identifying relevant competences and delivering proportionate measures.

Enforcement is equally nuanced. There is a real gap in the harmonised penalty structure of the AI Act: Article 99(4) does not list Article 4. That omission means there is no specific EU-level fine band dedicated to breaches of Article 4 comparable to the fine categories that apply to prohibited practices, core high-risk obligations, or transparency duties. However, the gap is not the same as total non-enforceability. Article 99(1) and (2) require Member States to lay down rules on penalties and other enforcement measures for infringements of the Regulation more generally, including warnings and non-monetary measures. The AI Office's own guidance[21] consequently states that national

19 Martin J. Koch, et al., "Meta AI Literacy Scale: Further Validation and Development of a Short Version," *Heliyon* 10, no. 23 (2024), https://doi.org/10.1016/j.heliyon.2024.e39686.

20 McIntosh et al., "From COBIT to ISO 42001."

21 "AI Literacy – Questions & Answers: Enforcement of Article 4," accessed May 17, 2026, https://digital-strategy.ec.europa.eu/en/faqs/ai-literacy-questions-answers#ecl-inpage-enforcement-of-article-4.

market surveillance authorities could impose penalties and other enforcement measures for non-compliance with Article 4.

The Commission launched a repository of AI literacy practices, collecting more than 40 initiatives, to support learning and exchange among providers and deployers of AI systems, as well as the wider public.[22] For example, Assicurazioni Generali has developed a comprehensive AI literacy programme as part of a broader digital upskilling and reskilling strategy for all employees.[23] The initiative is structured through a global e-learning platform ("WeLearn") and specialised internal academies for specific AI-related roles, such as Data Scientists, AI Business Translators, Smart Automation Experts, and other professionals. The programme follows a tiered approach consisting of basic, intermediate, and advanced AI literacy training depending on the employee's role, technical background, and level of involvement with AI systems. Particular emphasis is placed on responsible AI use, practical understanding of AI systems deployed within the organisation, and continuous adaptation of training to technological developments, including generative AI. The initiative also incorporates cooperation with universities and research centres and is regularly updated through annual reviews and organisational needs assessments.

Also particularly noteworthy is IBM's approach to AI literacy as a continuous organisational learning and workforce transformation strategy built around personalised, AI-assisted learning pathways.[24] Through its AI-powered 'Your Learning Platform', employees are encouraged to complete at least 40 hours of annual learning tailored to their role, technical background, and professional responsibilities. The programme includes both foundational and advanced AI topics, ranging from AI fundamentals, trustworthy AI, and AI ethics to generative AI, AI design, and data science skills. IBM further complements formal learning with practical initiatives such as the annual watsonx challenge, where employees apply AI tools to real workplace problems and develop AI-based solutions within their own professional context. The initiative emphasises continuous upskilling, adaptive learning, practical experimentation with AI systems, and building organisational trust and confidence in AI deployment.

These are companies and public-sector bodies, ranging from e-learning and in-person training to bootcamps and collaboration activities. Yet both the repository page and the AI Office's Q&A stress that reproducing practices from

22 "Repository of AI Literacy Practices," European Commission, accessed May 16, 2026, https://digital-strategy.ec.europa.eu/en/policies/repository-ai-literacy-practices.

23 "Assicurazioni Generali S.p.A.," in "Repository of AI Literacy Practices."

24 "IBM," in "Repository of AI Literacy Practices."

the repository does not automatically create a presumption of compliance. By publishing the practices, the European Commission does not imply either endorsement or evaluation in any way. The European Commission only verifies that all contributions received meet the minimum criteria of transparency and reliability before accepting them into the public repository.

4. Lithuanian Perspective and an Operational Model

Lithuania offers a useful national lens because its implementation architecture is now visible in official government materials. The Ministry of the Economy and Innovation states that, following parliamentary amendments adopted in January 2025, the Innovation Agency was designated as the notifying authority, while the Communications Regulatory Authority became the market surveillance authority and single contact point under the AI Act.[25] The same ministry also identifies AI literacy and compliance as practical priorities for the public sector, noting the creation of an AI Competence Centre intended to enhance AI literacy and AI Act compliance across public administration, alongside an AI regulatory sandbox designed to support businesses with conformity and compliance questions.[26]

The Lithuanian strategic picture is consistent with institutional design. Lithuania's 2026–2035 national AI strategic guidelines[27] give priority to talent and competences and expressly include a strand aimed at strengthening AI competences among public-sector employees. The aim is also to emphasise investment in talent and competences as a precondition for AI innovation and invites citizens to learn to use new opportunities. It places literacy not merely within school curricula, but within public administration, labour capability, and innovation strategy.

Lithuania has been investing significantly in the development of digital and technological infrastructure necessary for the advancement of artificial intelligence.[28] A particularly significant example is the establishment of the

25 "Artificial Intelligence," Ministry of the Economy and Innovation of the Republic of Lithuania, accessed May 16, 2026, https://eimin.lrv.lt/en/sector-activities/digital-policy/artificial-intelligence/.

26 "Artificial Intelligence."

27 Ministry of the Economy and Innovation of the Republic of Lithuania, *2026–2035 metų nacionalinės dirbtinio intelekto strateginės gairės*, accessed May 16, 2026, https://eimin.lrv.lt/public/canonical/1776768134/6547/Nacionalines_DI_strategines_gaires.pdf.

28 "Artificial Intelligence."

LitAI Artificial Intelligence Competence and Technology Centre, a €130 million initiative jointly financed by the European Union and the Lithuanian government.[29]

Needless to say, Lithuania also has AI literacy initiatives developed within academia. Vilnius University's Faculty of Law has developed a practical six-step AI literacy approach[30] intended to operationalise Article 4 AI Act requirements within organisational environments. This proposed framework is to structure the curriculum around six key domains of AI knowledge: (1) AI fundamentals (basic concepts of AI, such as artificial intelligence, machine learning, and algorithms); (2) technical operation of AI systems (how AI systems work in practice, data input and output, model limitations); (3) AI-related risks and limitations (bias, errors, security vulnerabilities, etc., and their implications for justice); (4) opportunities and benefits of AI in courts (how AI might improve efficiency, access to justice, etc., so learners see positive use-cases as well); (5) ethical principles and human rights (ensuring AI use aligns with principles of fairness, non-discrimination, transparency, and accountability); and (6) relevant legal rules and governance (the EU AI Act obligations, data protection law, and any national regulations or guidelines on AI use in the public sector).[31] Although the model initially evolved from research on AI literacy in courts,[32] it was subsequently designed as a broader governance-oriented framework rather than a narrow technical training programme. Consequently, effective AI literacy frameworks should distinguish between basic, advanced, and specialised levels of training.[33] Foundational courses should focus on general awareness, core AI concepts, ethical and legal implications, data protection, and risks related to the unsupervised use of generative AI tools. More advanced training should be

29 "EIMIN: Lietuva laimėjo 65 mln. eurų ES konkursą – bus steigiamas pirmasis dirbtinio intelekto centras šalyje [Lithuania Wins €65 Million EU Tender – the Country's First Artificial Intelligence Centre Will Be Established]," *Lietuva.lt*, October 14, 2025, accessed May 15, 2026, https://lietuva.lt/valdymas/eimin-lietuva-laimejo-65-mln-euru-es-konkursa-bus-steigiamas-pirmasis-dirbtinio-intelekto-centras-salyje/.

30 The Six-Step AI Literacy Approach was developed and designed by co-author of this chapter Neringa Gaubienė. It was first introduced during the presentation 'AI and the Judiciary: Exploring Possibilities and Pitfalls' at the Advanced Training in EU Law for Judges and Prosecutors, organised by the Academy of European Law (ERA) in Vilnius, 12–14 May 2025.

31 Agne Limante and Neringa Gaubiene, "AI Literacy and Courts under the EU AI Act," in *The Cambridge Handbook of AI and Technologies in Courts*, ed. Monika Zalnieriute and Agne Limante (Cambridge University Press, 2026), 458, https://www.cambridge.org/core/books/abs/cambridge-handbook-of-ai-and-technologies-in-courts/ai-literacy-and-courts-under-the-eu-ai-act/9136DB3EE816F2E2BF3A0CD102B7F94C.

32 Limante and Gaubiene, "AI Literacy and Courts under the EU AI Act," 458.

33 Limante and Gaubiene, "AI Literacy and Courts under the EU AI Act," 458.

more specific. In parallel, specialised courses may be necessary for individuals responsible for operating or managing particular AI systems, focusing on the practical functionality, limitations, risks, and troubleshooting of specific tools. Moreover, another particularly important segment consists of management-level personnel and CEOs, whose AI literacy needs extend beyond operational use toward strategic governance and organisational transformation.

5. Conclusion

The AI Act introduces AI literacy as a legally relevant governance obligation and positions human competence as an essential condition for the safe, lawful, and trustworthy deployment of AI systems. Article 4, read together with Article 3(56), Recital 20, Article 53, and the broader enforcement architecture of the Regulation, demonstrates that AI literacy is not limited to technical knowledge alone. Instead, it encompasses legal awareness, ethical understanding, contextual judgement, organisational preparedness, and the ability to identify risks, limitations, and potential harms associated with AI systems.

The legal structure of Article 4 creates uncertainty. The provision initially combined a conduct-oriented obligation to 'take measures', while simultaneously softening the standard through the phrase 'to their best extent'. This drafting approach intentionally leaves room for flexibility and proportionality, but also creates uncertainty concerning the evidential threshold for compliance, the practical meaning of organisational preparedness, and the level of measures expected from providers and deployers. The Digital Omnibus initiative reflects an important regulatory shift toward a more flexible and innovation-oriented implementation model. The proposal to replace the obligation to ensure a 'sufficient level' of AI literacy with a softer obligation to *take measures to support the development of AI literacy* demonstrates an attempt to reduce administrative burdens and facilitate implementation, particularly for SMEs and smaller market actors. At the same time, this recalibration risks weakening one of the AI Act's most innovative elements: the integration of human competence and informed judgement into the governance architecture of trustworthy AI.

The analysis further demonstrates that AI literacy under the AI Act should be interpreted as a contextual and role-dependent obligation. Compliance cannot realistically be achieved through generic awareness sessions or purely technical instruction alone. Organisations must instead adopt proportionate and differentiated literacy measures reflecting the nature of the AI systems used,

the level of risk involved, the organisational role of relevant persons, and the potential impact on affected individuals. In this respect, AI literacy functions not merely as training, but as an organisational governance mechanism closely connected to accountability, risk management, and human oversight.

Current implementation guidance issued by the European Commission and the AI Office deliberately avoids imposing rigid certification schemes, formal testing obligations, or mandatory organisational structures. While this flexible approach is appropriate given the diversity of organisational contexts, it leaves unresolved methodological questions concerning the assessment and demonstration of AI literacy. Existing academic literature likewise confirms that AI literacy measurement remains fragmented and methodologically unsettled. Consequently, compliance with Article 4 should not be interpreted as requiring universal testing or standardised credentials, but rather as requiring organisations to demonstrate a credible process for identifying competence needs, delivering appropriate literacy measures, and maintaining organisational awareness regarding AI-related risks and responsibilities.

The enforcement framework of Article 4 remains incomplete. Although the AI Act does not establish a dedicated EU-level sanction regime specifically for AI literacy violations, Article 99 nevertheless allows Member States to introduce national penalties and other enforcement measures.

The Lithuanian perspective illustrates how national implementation strategies may operationalise AI literacy obligations in practice. Lithuania's strategic AI policy initiatives, investments in digital infrastructure, and the establishment of the LitAI competence centre demonstrate that AI literacy is increasingly viewed as part of broader technological sovereignty, and governance capacity building efforts. At the same time, the six-step AI literacy framework developed by the Vilnius University Faculty of Law provides a practical example of how Article 4 obligations may be translated into practice combining technical, ethical, legal, and strategic dimensions of AI literacy.

Ultimately, AI literacy under the AI Act should be understood not as a formalistic compliance exercise, but as a continuous governance process embedded within organisational culture, accountability structures, and responsible AI deployment.

References

DigitalEU. "Third AI Pact Webinar on AI Literacy." Webinar, February 20, 2025. Posted by European Commission. YouTube, 1:20:20. https://www.youtube.com/watch?v=Dyf4ZVts9HY.

"EIMIN: Lietuva laimėjo 65 mln. eurų ES konkursą – bus steigiamas pirmasis dirbtinio intelekto centras šalyje [Lithuania Wins €65 Million EU Tender – the Country's First Artificial Intelligence Centre Will Be Established]." *Lietuva.lt*, October 14, 2025. Accessed May 15, 2026. https://lietuva.lt/valdymas/eimin-lietuva-laimejo-65-mln-euru-es-konkursa-bus-steigiamas-pirmasis-dirbtinio-intelekto-centras-salyje/.

European Commission. "AI Literacy – Questions & Answers." Accessed May 16, 2026. https://digital-strategy.ec.europa.eu/en/faqs/ai-literacy-questions-answers.

European Commission. "AI Literacy – Questions & Answers: Enforcement of Article 4." Accessed May 17, 2026. https://digital-strategy.ec.europa.eu/en/faqs/ai-literacy-questions-answers#ecl-inpage-enforcement-of-article-4.

European Commission. "AI Act." Accessed May 16, 2026. https://digital-strategy.ec.europa.eu/en/policies/regulatory-framework-ai.

European Commission. "Repository of AI Literacy Practices." Accessed May 16, 2026. https://digital-strategy.ec.europa.eu/en/policies/repository-ai-literacy-practices.

European Commission. Proposal for a Regulation of the European Parliament and of the Council Amending Regulations (EU) 2024/1689 and (EU) 2018/1139 as Regards the Simplification of the Implementation of Harmonised Rules on Artificial Intelligence (Digital Omnibus on AI). COM(2025) 836 final. November 19, 2025. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52025PC0836.

Eversheds Sutherland. "EU Digital Omnibus: At a Glance." Accessed May 17, 2026. https://www.eversheds-sutherland.com/pl/poland/insights/eu-digital-omnibus-at-a-glance.

Koch, Martin J., Astrid Carolus, Carolin Wienrich, and Marc E. Latoschik. "Meta AI Literacy Scale: Further Validation and Development of a Short Version." *Heliyon* 10, no. 23 (2024). https://doi.org/10.1016/j.heliyon.2024.e39686.

Limante, Agne, and Neringa Gaubiene. "AI Literacy and Courts under the EU AI Act." In *The Cambridge Handbook of AI and Technologies in Courts*, edited by Monika Zalnieriute and Agne Limante. Cambridge University Press, 2026. https://www.cambridge.org/core/books/abs/cambridge-handbook-of-ai-and-technologies-in-courts/ai-literacy-and-courts-under-the-eu-ai-act/9136DB3EE816F2E2BF3A0CD102B7F94C.

Long, Duri, and Brian Magerko. "What Is AI Literacy? Competencies and Design Considerations." In *CHI '20: Proceedings of the 2020 CHI Conference on Human*

Factors in Computing Systems. Association for Computing Machinery, 2020. https://doi.org/10.1145/3313831.3376727.

McIntosh, Timothy R., Teo Susnjak, Tong Liu et al. "From COBIT to ISO 42001: Evaluating Cybersecurity Frameworks for Opportunities, Risks, and Regulatory Compliance in Commercializing Large Language Models." *Computers & Security* 144 (2024): 103964.https://doi.org/10.1016/j.cose.2024.103964.

Miao, Fengchun, Kelly Shiohira, and Natalie Lao. *AI Competency Framework for Students*. UNESCO, 2024. https://doi.org/10.54675/JKJB9835. Ministry of the Economy and Innovation of the Republic of Lithuania. "Artificial Intelligence." Accessed May 16, 2026. https://eimin.lrv.lt/en/sector-activities/digital-policy/artificial-intelligence/.

Ministry of the Economy and Innovation of the Republic of Lithuania. *2026–2035 metų nacionalinės dirbtinio intelekto strateginės gairės*. Accessed May 16, 2026. https://eimin.lrv.lt/public/canonical/1776768134/6547/Nacionalines_DI_strategines_gaires.pdf.

Ng, Davy Tsz Kit, Jac Ka Lok Leung, Samuel Kai Wah Chu, and Maggie Shen Qiao. "Conceptualizing AI Literacy: An Exploratory Review." *Computers and Education: Artificial Intelligence* 2 (2021): 100041. https://doi.org/10.1016/j.caeai.2021.100041.

The European Parliament. Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 Laying Down Harmonised Rules on Artificial Intelligence and Amending Regulations (EC) No 300/2008, (EU) No 167/2013, (EU) No 168/2013, (EU) 2018/858, (EU) 2018/1139 and (EU) 2019/2144 and Directives 2014/90/EU, (EU) 2016/797 and (EU) 2020/1828 (Artificial Intelligence Act). Official Journal of the European Union, 2024/1689. July 12, 2024. https://eur-lex.europa.eu/eli/reg/2024/1689/oj.

Yim, Iris Heung Yue. "A Critical Review of Teaching and Learning Artificial Intelligence (AI) Literacy: Developing an Intelligence-Based AI Literacy Framework for Primary School Education." *Computers and Education: Artificial Intelligence* 7 (2024): 100319. https://doi.org/10.1016/j.caeai.2024.100319.

Abstract

AI Literacy under the EU AI Act: Governance, Implementation Challenges, and the Digital Omnibus Recalibration

This article analyses the legal concept of AI literacy under Regulation (EU) 2024/1689 (AI Act), focusing particularly on Article 4 and its relationship with Articles 3(56), 53, Recital 20, and the broader enforcement architecture of the Regulation. The article examines how the AI Act positions AI literacy as a foundational governance mechanism intended to ensure informed, safe, and trustworthy deployment of

artificial intelligence systems. The article argues that AI literacy under the AI Act cannot be reduced to technical competence alone, but instead constitutes a contextual, relational, and governance-oriented concept encompassing legal, ethical, organisational, and operational understanding of AI systems. Using doctrinal legal analysis and interdisciplinary literature on AI literacy, the article evaluates the emerging implementation guidance of the European Commission's AI Office, relevant academic scholarship, and governance standards such as ISO/IEC 42001:2023. The article further explores enforcement challenges, evidential difficulties related to assessing organisational AI literacy, and the absence of harmonised sanctions specifically linked to Article 4 violations. Finally, the article presents the Lithuanian perspective as an illustrative case study, highlighting national institutional developments, strategic AI governance initiatives, and the Vilnius University Faculty of Law six-step AI literacy framework as an example of a practical operational model for organisational AI literacy compliance. The article concludes that effective AI literacy should be understood not as a formalistic training obligation, but as a continuous governance process embedded within organisational risk management, accountability, and trustworthy AI deployment.

Keywords: AI literacy, EU AI Act, Article 4 AI Act, artificial intelligence governance, AI compliance, Digital Omnibus, trustworthy AI, organisational governance, AI regulation, AI governance, implementation challenges, Lithuania, ISO/IEC 42001, responsible AI, AI policy

Santrauka

DI raštingumas pagal ES Dirbtinio intelekto aktą: valdymas, įgyvendinimo iššūkiai ir Digital Omnibus iniciatyvos nulemtas reguliavimo perkalibravimas

Šiame straipsnyje analizuojama dirbtinio intelekto (DI) raštingumo teisinė samprata pagal Reglamentą (ES) 2024/1689 (Dirbtinio intelekto aktą), ypatingą dėmesį skiriant jo 4 straipsniui ir sąsajoms su 3 straipsnio 56 punktu, 53 straipsniu, 20 konstatuojamąja dalimi bei bendrąja reglamento priežiūros ir įgyvendinimo sistema. Straipsnyje nagrinėjama, kaip DI akte DI raštingumas įtvirtinamas kaip vienas esminių valdymo instrumentų, skirtų užtikrinti informuotą, saugų ir patikimą dirbtinio intelekto sistemų naudojimą bei diegimą. Straipsnyje teigiama, kad DI raštingumas pagal DI aktą negali būti suprantamas vien kaip techninių žinių ar gebėjimų visuma. Tai platesnė, kontekstinė ir į valdymą orientuota sąvoka, apimanti teisinį, etinį, organizacinį ir praktinį dirbtinio intelekto sistemų veikimo bei jų poveikio supratimą. Remiantis doktrininiu teisiniu tyrimu ir tarpdisciplinine

DI raštingumo literatūra, straipsnyje vertinamos Europos Komisijos DI biuro parengtos įgyvendinimo gairės, akademiniai tyrimai ir valdymo standartai, įskaitant ISO/IEC 42001:2023. Taip pat analizuojami DI raštingumo reikalavimų įgyvendinimo ir priežiūros iššūkiai, organizacinio DI raštingumo vertinimo problematika bei tai, kad DI akte nėra numatyta aiškių ir suderintų sankcijų už 4 straipsnyje nustatytų pareigų nesilaikymą. Galiausiai straipsnyje Lietuvos patirtis pristatoma kaip iliustratyvus atvejo tyrimas, aptariant nacionalinius institucinius pokyčius, strategines DI valdymo iniciatyvas ir Vilniaus universiteto Teisės fakulteto sukurtą šešių žingsnių DI raštingumo modelį kaip praktinį organizacijų atitikties užtikrinimo pavyzdį. Straipsnyje daroma išvada, kad veiksmingas DI raštingumas turėtų būti suprantamas ne kaip formalus mokymų organizavimo reikalavimas, bet kaip nuolatinis organizacinio valdymo procesas, integruotas į rizikos valdymą, atskaitomybę ir patikimo dirbtinio intelekto diegimą.

Pagrindiniai žodžiai: DI raštingumas, ES DI aktas, DI akto 4 straipsnis, DI valdymas, DI atitiktis, „Digital Omnibus“, patikimas DI, organizacinis valdymas, DI reguliavimas, DI valdymas, įgyvendinimo iššūkiai, Lietuva, ISO/IEC 42001, atsakingas DI, DI politika

The Intersections of Criminal, Administrative and Civil Law:
International and National Contexts, pp. 149–173
https://doi.org/10.12797/9788383685328.07

Justyna Levon
Vilnius University, Faculty of Law
justyna.levon@tf.vu.lt

Dovilė Valančienė
Vilnius University, Faculty of Law
dovile.valanciene@tf.vu.lt

The Intersection of Neuroscience and Criminal Law: The Analysis of Emerging Themes

1. Introduction

Neuroscience is often presented as a science that seeks to understand human thinking, emotions, and behaviour.[1] It is also called the study of the brain and nervous system which aims to explore how brain function affects behaviour.[2] A wide range of fields, such as (and not limited to): biology, medicine, chemistry, physics, psychology, mathematics, computer science, philosophy, law etc. are mentioned with which neuroscience is related (Spranger, 2012).

Modern studies of the nervous system have been conducted since the mid-nineteenth century. Neuroatomists studied the shape of the brain, its cellular structure and its circuitry; neurochemists studied the chemical composition of the brain, its lipids and proteins; neurophysiologists studied the bioelectrical properties of the brain; psychologists and neuropsychologists studied the organisation and neural substrates of behavior and cognition.[3] According to

1 The Society for Neuroscience, accessed May 12, 2026, http://www.sfn.org/.

2 Paul Catley and Lisa Claydon, "The Use of Neuroscientific Evidence in the Courtroom by Those Accused of Criminal Offenses in England and Wales," *Journal of Law and the Biosciences* 2, no. 3 (2015): 514, https://doi.org/10.1093/jlb/lsv025.

3 Larry R. Squire, Darwin Berg, Floyd E. Bloom, Sascha du Lac, Airvan Ghosh, and Nicholas C. Spitzer, eds., *Fundamental Neuroscience* (Elsevier, 2013).

some, the first official use of the term 'neuroscience' dates back to 1962, when it appeared in the name of Massachusetts Institute of Technology's 'Neurosciences Research Program' in the United States.[4] Currently, neuroscience is one of the fastest growing areas of science.[5] In 1969, the Society for Neuroscience had 500 members and today it has grown to more than 40,000, which shows its rapid development.[6] According to Goodenough and Tucker,[7] in the 1990s, new technologies (for example, functional magnetic resonance imaging (fMRI)) *opened up the black box of cognition, marrying the insights of traditional psychology with a functional analysis of the biology of brain activity* and the term 'cognitive neuroscience' was coined during the 1990s to describe this combination.

It is often mentioned that neuroscience can contribute a great deal to understanding human behaviour, on the other hand, law has considered issues of thought and behaviour for centuries.[8] The interest in the field of analysis, focusing on the intersection of law and neuroscience has increased in recent years, which manifests in the growing number of publications prepared each year (for example: Jones and Shen;[9] Kolber;[10] Shen;[11] Shen[12]). Law and cognitive neuroscience are sometimes called 'natural partners'.[13] It is often mentioned that in the future legal science will inevitably face greater changes.[14] Even the term 'neurolaw' emerged, which is sometimes described as an interdisciplinary field which links the brain to law, and facilitates the pathway to better understanding

4 Irina A. Filipova, "Neurotechnologies in Law and Law Enforcement: Past, Present and Future," *Pravoprimenenie – Law Enforcement Review* 6, no. 2 (2022): 32–49, https://doi.org/10.52468/2542–1514.2022.6(2).32-49.

5 Squire, Berg, Bloom, du Lac, Ghosh and Spitzer, *Fundamental Neuroscience*.

6 The Society for Neuroscience.

7 Oliver R. Goodenough and Micaela Tucker, "Law and Cognitive Neuroscience," *Annual Review of Law and Social Science* 6 (2010): 62, https://doi.org/10.1146/annurev.lawsocsci.093008.131523.

8 Goodenough and Tucker, "Law and Cognitive Neuroscience," 61–92.

9 Owen D. Jones and Francis X. Shen, "Law and Neuroscience in the United States," in *International Neurolaw: A Comparative Analysis*, ed. Tade Matthias Spranger (Springer, 2012), 349–380, https://ssrn.com/abstract=2001085.

10 Adam Kolber, "Will There Be a Neurolaw Revolution?" *Indiana Law Journal* 89, no. 2 (2014), https://www.repository.law.indiana.edu/ilj/vol89/iss2/7.

11 Francis X. Shen, "The Overlooked History of Neurolaw," *Fordham Law Review* 84 (2016): 667–695, https://ssrn.com/abstract=2899031.

12 Francis X. Shen, "Law and Neuroscience 2.0," *Arizona State Law Journal* 48 (2017): 1043–1086, https://ssrn.com/abstract=2942499.

13 Goodenough and Tucker, "Law and Cognitive Neuroscience," 61–92; Kolber, "Will There Be a Neurolaw Revolution?".

14 Dovilė Valančienė, "Neuroteisė: keletas fundamentalių įžvalgų apie teisminių sprendimų priėmimą," *Teisė* 104 (2017): 144–158, https://doi.org/10.15388/Teise.2017.104.10850.

of human behaviour in order to regulate it accurately through incorporating neuroscience achievements in legal studies.[15] Scientists conduct legally relevant studies and legal scholars write commentaries on neurolaw (see more: Wolpe et al.;[16] Appelbaum;[17] Moriarty;[18] Seaman;[19] Wagner;[20] Brown and Murphy;[21] Langleben, et. al.;[22] Shen[23]). What is more, international scale legal documents (or their drafts) formulating standards for the development of neurotechnologies started emerging. For example, the Recommendation on Responsible Innovation in Neurotechnology was adopted by the Organisation for Economic Cooperation and Development Council in 2019. The latter aims to guide governments and innovators to anticipate and address the ethical, legal and social challenges raised by novel neurotechnologies while promoting innovation in the field.[24] In 2020 the Parliamentary Assembly of the Council of Europe prepared recommendations called – 'Brain-computer interface: new rights or new threats to fundamental freedoms?'. It is mentioned that ethical principles must be applied to the development and application of neurotechnology, for example: beneficence and prevention of malign use (technology should be developed and applied only for purposes that are consistent with respect for human rights and dignity); capacity and autonomy (technology should not be

15 Arian Petoft, Mohmoud Abbasi and Alireza Zali, "Toward Children's Cognitive Development from the Perspective of Neurolaw: Implications of *Roper v. Simmons*," *Psychiatry, Psychology and Law* 30, no. 2 (2023): 144–156, https://doi.org/10.1080/13218719.2021.2003267.

16 Paul Root Wolpe, Kenneth R. Foster and Daniel D. Langleben, "Emerging Neurotechnologies for Lie-Detection: Promises and Perils," *The American Journal of Bioethics* 5, no. 2 (2005): 39–49.

17 Paul S. Appelbaum, "Law & Psychiatry: The New Lie Detectors: Neuroscience, Deception, and the Courts," *Psychiatric Services* 58, no. 4 (2007): 460.

18 Jane Campbell Moriarty, "Visions of Deception: Neuroimages and the Search for Truth," *Akron Law Review* 42, no. 3 (2009): 739–761.

19 Julie Seaman, "Black Boxes: fMRI Lie Detection and the Role of the Jury," *Akron Law Review* 42, no. 3 (2009): 931–939.

20 Anthony Wagner, "Can Neuroscience Identify Lies?" in *A Judge's Guide to Neuroscience: A Concise Introduction* (University of California, 2010).

21 Teneille Brown and Emily Murphy, "Through a Scanner Darkly: Functional Neuroimaging as Evidence of a Criminal Defendant's Past Mental States," *Stanford Law Review* 62, no. 4 (2010): 1119–1168.

22 Daniel D. Langleben, Dan F. X. Willard and Jane C. Moriarty, "Brain Imaging of Deception," in *Neuroimaging in Forensic Psychiatry: From the Clinic to the Courtroom*, ed. Joseph R. Simpson (John Wiley & Sons, 2012), https://doi.org/10.1002/9781119968900.ch13.

23 Francis X. Shen, "Neuroscience, Mental Privacy, and the Law," *Harvard Journal of Law & Public Policy* 36 (2013): 653–713, https://scholarship.law.umn.edu/faculty_articles/599.

24 OECD, *Recommendation of the Council on Responsible Innovation in Neurotechnology*, OECD/LEGAL/0457.

used against a subject's will); privacy and confidentiality (information gathered must be protected according to general principles of data protection); ensuring public trust through transparency, consultation and awareness raising of the benefits as well as the potential dangers; etc.[25]

The intersection between neuroscience and the law is sometimes divided into three subsections – the law of neuroscience (refers to the regulation of neuroscientific research); neuroscience and the law (refers to the neuroscience relating to normative judgment and decision-making) and neuroscience in law (refers to the study of cognition and behavioural patterns relevant for legal purposes).[26]

Much of the neurolaw activity recently has been in fields that relate to criminal law and courtroom use.[27] In 2007 the John D. and Catherine T. MacArthur Foundation funded the establishment of the Law and Neuroscience Project.[28] This project, composed of about 40 neuroscientists, lawyers, etc., addressed problems at the intersection of neuroscience and criminal justice: 1) law-relevant mental states of decision-making processes; 2) the relationship between brain development and cognitive capacities in adolescents; and 3) assessing how best to draw inferences about individuals from group-based neuroscientific data.[29] Neuroscience contributes to the way criminal justice systems view criminality.[30] It is also helpful to criminal law because in many ways a study of the mind and mental states are central to criminal law.[31] Neuroscience can help to find answers to questions that have been hard for traditional psychology and the other social sciences to resolve.[32] Recent empirical studies confirm also that the use of neuroscience evidence in criminal justice is increasing (for

25 Becht, *The Brain-Computer Interface: New Rights or New Threats to Fundamental Freedoms?*, Committee on Legal Affairs and Human Rights, Doc. 15147, September 24, 2020.

26 Geert Philip Stevens, "'My Brain Made Me Do It?' Reflections on the Role of Neuroscience in Assessing Criminal Responsibility – A South African Medico-Legal Perspective," *Psychiatry, Psychology and Law* 27, no. 2 (2020): 203, https://doi.org/10.1080/13218719.2019.1688131.

27 Goodenough and Tucker, "Law and Cognitive Neuroscience," 82.

28 The MacArthur Foundation, Research Network on Law and Neuroscience, accessed May 12, 2026, https://lawneuro.org/.

29 Michael S. Gazzaniga, "The Law and Neuroscience," *Neuron* 60, no. 3 (2008): 412–415, https://doi.org/10.1016/j.neuron.2008.10.022.

30 Armin Alimardani, "Neuroscience, Criminal Responsibility and Sentencing in an Islamic Country: Iran," *Journal of Law and the Biosciences* 5, no. 3 (2018): 725, https://doi.org/10.1093/jlb/lsy024.

31 John B. Meixner Jr., "Applications of Neuroscience in Criminal Law: Legal and Methodological Issues," *Current Neurology and Neuroscience Reports* 15 (2015): 513, https://ssrn.com/abstract=2536580.

32 Goodenough and Tucker, "Law and Cognitive Neuroscience," 65.

example: Denno;[33] Catley and Claydon;[34] de Kogel and Westgeest;[35] Farahany;[36] Chandler;[37] Gaudet and Marchant;[38] Ginther;[39] Shen[40]). According to some, neuroscientific tools can be used to indicate the brain abnormality for different purposes, such as establishing an insanity defence or mitigating the sentence due to reduced capacity to control behaviour.[41] Questions about responsibility and free will have also attracted academic attention.[42]

2. The Aim and Methodology of the Article

The aim of this article is to identify the main topics that appear in the scientific articles tackling the theme of criminal law[43] and neuroscience. In order to reach the planned goal, a narrative approach in combination with a thematic analysis was used to summarise the main topics discussed in the analysed literature.

The presented PRISMA flowchart in Figure 1 illustrates the process of the search and the selection of the articles.

Firstly, a systematic literature review by search in the Web of Science (WoS) database (web of science core collection) using the search terms 'criminal law' and 'neuroscience'; within the period 1992–2026 (until 1st May) for all fields

33 Deborah W. Denno, "Courts' Increasing Consideration of Behavioral Genetics Evidence in Criminal Cases: Results of a Longitudinal Study," *Michigan State Law Review* (2011): 967–1047.

34 Catley and Claydon, "The Use of Neuroscientific Evidence in the Courtroom by Those Accused of Criminal Offenses in England and Wales," 510–549.

35 C. H. de Kogel and E. J. M. C. Westgeest, "Neuroscientific and Behavioral Genetic Information in Criminal Cases in the Netherlands," *Journal of Law and the Biosciences* 2, no. 3 (2015): 580–605, https://doi.org/10.1093/jlb/lsv024.

36 Nita A. Farahany, "Neuroscience and Behavioral Genetics in US Criminal Law: An Empirical Analysis," *Journal of Law and the Biosciences* 2, no. 3 (2015): 485–509, https://doi.org/10.1093/jlb/lsv059.

37 Jennifer A. Chandler, "The Use of Neuroscientific Evidence in Canadian Criminal Proceedings," *Journal of Law and the Biosciences* 2, no. 3 (2015): 550–579, https://doi.org/10.1093/jlb/lsv026.

38 Lyn M. Gaudet and Gary E. Marchant, "Under the Radar: Neuroimaging Evidence in the Criminal Courtroom," *Drake Law Review* 64 (2016): 577–620, https://ssrn.com/abstract=2838996.

39 Matthew Ginther, "Neuroscience or Neurospeculation? Peer Commentary on Four Articles Examining the Prevalence of Neuroscience in Criminal Cases around the World," *Journal of Law and the Biosciences* 3, no. 2 (2016): 324–329.

40 Shen, "The Overlooked History of Neurolaw," 667–694.

41 Alimardani, "Neuroscience, Criminal Responsibility and Sentencing in an Islamic Country: Iran," 725.

42 Goodenough and Tucker, "Law and Cognitive Neuroscience," 74.

43 Criminal law in this article is understood in a broad sense as field of law that deals with crimes (their prevention, prosecution, punishment etc.).

(the 'Web of Science Categories' filter was used); was executed. This led to a total of 265 records.

Secondly, only 'research articles' were selected (n=199) and all other records (n=66) were excluded.

Further on, non-English language articles (n=15) were excluded and only the ones in English language were left for analysis (n=184).

In the next step, only the articles that were available as open access version in the database (n=70) were selected and the other records excluded (n=114).

Finally, the 'Web of Science Categories' filter was used to select only 'legal articles' (n=32); other records (n=38) were excluded.

During the final screening stage, 32 law-related articles were assessed. Five articles were excluded for the following reasons: non-English publications (n=2), an invited non-research paper (n=1), and articles lacking relevant neuroscience aspects (n=2). Consequently, 27 articles were included in the final review.

Results

In this section analysed articles are categorised based on their thematic focus. Brief summaries, presented accordingly to the publication date, highlighting some principal ideas analysed by the authors, are presented. The aim is to outline key themes tackled in the mentioned articles and publication period while detailed interpretation and analysis follow in the section *Discussion* of the current study. The thematic categorisation of articles is based on the authors' interpretation, which may introduce a degree of subjectivity.

2.1. Articles Tackling the Theme of Responsibility and Decision Making

Burns and Bechara[44] examine the relationship between free will, decision making and neuroscience. They argue that decision-making is strongly influenced by implicit neural processes that often occur outside of conscious awareness.

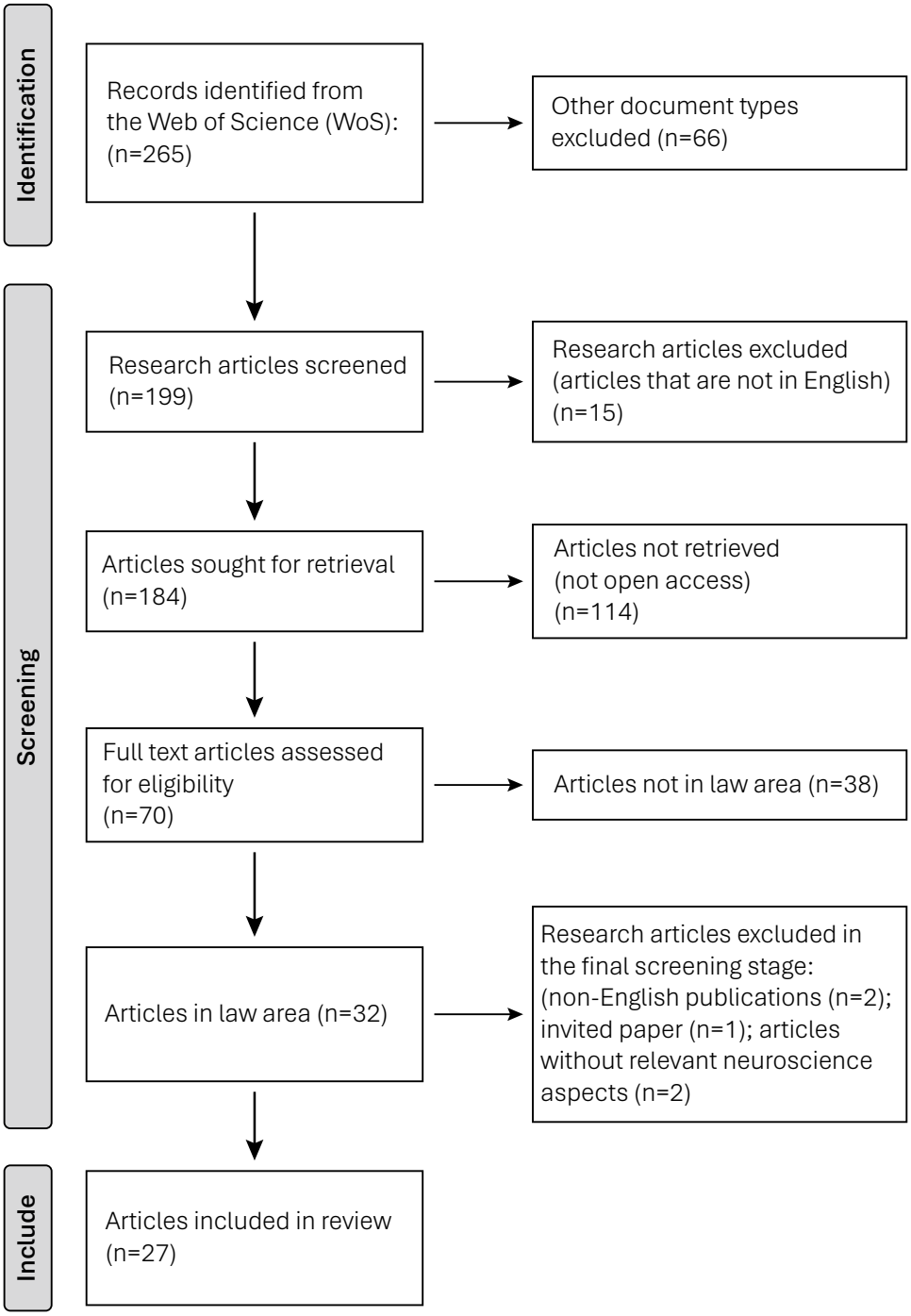
Maoz and Yaffe[45] in their article examine the question of voluntary act, intention and perception of risk.

---

44 Kelly Burns and Antoine Bechara, "Decision Making and Free Will: A Neuroscience Perspective," *Behavioral Sciences & the Law* 25, no. 2 (2007): 263–280, https://doi.org/10.1002/bsl.751.

45 Uri Maoz and Gideon Yaffe, "What Does Recent Neuroscience Tell Us about Criminal Responsibility?" *Journal of Law and the Biosciences* 3, no. 1 (2016): 120–139, https://doi.org/10.1093/jlb/lsv051.

Figure 1. PRISMA flowchart of article search and collection



Slobogin[46] examines the role of neuroscience in determining the culpability of offenders.

Gordon and Fondacaro[47] in their analysis suggest rethinking punishment and putting *actus reus* at the centre of responsibility without relying on popular notions of free will.

Casey et al.[48] examine juvenile justice through the lens of developmental neuroscience and human rights. This article examines how developmental neuroscience answers the question of when adolescents reach the ability to make responsible decisions.

Coppola[49] suggests seeing humans not just as 'hubs of cognitions' and to think of responsibility through a more comprehensive lens, for example, where emotions also play an important role.

Petoft, Abbasi and Zali[50] analyse children's cognitive development in the context of criminal responsibility. The article argues that cognitive development – including perception, thinking, and reasoning – continues into early adulthood and thus has direct implications for juvenile delinquency and legal responsibility.

List[51] analyses the question of free will, and responsibility in criminal law. He talks about a compatibilist version of free-will libertarianism: an account of free will that simultaneously respects physical determinism, the openness of choices and realism about free will. At the same time the author mentions that there are reasons for rejecting a retributivist approach to punishment.

Danagher[52] analysed the controversial role of psychopathy at the intersection of neuroscience, criminal law, and responsibility. The article highlighted several important issues, including the uncertain neurobiological basis of psychopathy,

---

46 Christopher Slobogin, "Neuroscience Nuance: Dissecting the Relevance of Neuroscience in Adjudicating Criminal Culpability," *Journal of Law and the Biosciences* 4, no. 3 (2017): 577–593, https://doi.org/10.1093/jlb/lsx033.

47 Natalie S. Gordon and Mark R. Fondacaro, "Rethinking the Voluntary Act Requirement: Implications from Neuroscience and Behavioral Science Research," *Behavioral Sciences & the Law* 36, no. 4 (2018): 426–436, https://doi.org/10.1002/bsl.2352.

48 B. J. Casey et al., "Healthy Development as a Human Right: Insights from Developmental Neuroscience for Youth Justice," *Annual Review of Law and Social Science* 16 (2020): 203–222, https://doi.org/10.1146/annurev-lawsocsci-101317–031101.

49 Federica Coppola, "We Are More Than Our Executive Functions: On the Emotional and Situational Aspects of Criminal Responsibility and Punishment," *Criminal Law and Philosophy* 16 (2022): 253–266, https://doi.org/10.1007/s11572-021-09594-5.

50 Petoft, Abbasi and Zali, "Toward Children's Cognitive Development from the Perspective of Neurolaw: Implications of *Roper v. Simmons*," 144–156.

51 Christian List, "Mechanical Choices: A Compatibilist Libertarian Response," *Criminal Law and Philosophy* 18 (2024): 109–131, https://doi.org/10.1007/s11572-023-09671-x.

52 Luke Danagher, "Psychopathy, Neuroscience, and Critical Issues: A Legal Primer," *International Journal of Law and Psychiatry* 103 (2025): 102139, https://doi.org/10.1016/j.ijlp.2025.102139.

the limitations of current assessment instruments, and the tension between dimensional scientific understandings and the law's traditionally binary approach to criminal responsibility.

2.2. Articles Focusing on the Examples of Intersection Between Neuroscience and Criminal Law in the Context of Specific Countries

Farahany[53] examined the increasing use of neurobiological evidence in US criminal law and showed that the number of references in judicial opinions increased from about 100 per year in 2005 to 250–300 in 2012. As this author notes, it made a positive contribution to criminal justice, for example by improving the determination of sanity and sparking new debates about the purpose of punishment.

Chandler[54] examined Canadian case law of the period 2008–2012, involving the use of neuroscientific evidence.

Claydon[55] examines the role of neuroscience in reforming mental condition defences in England and Wales. The article focuses on the insanity defence and considers how developments in neuroscientific knowledge may contribute to assessing guilt, fitness to plead, sentencing, and criminal responsibility. The author also explores whether the more nuanced Dutch approach could provide a useful model for reforming English law.

Catley and Claydon[56] examined the extent of the use of neuroscience evidence in England and Wales and identified 204 reported cases in which such evidence was used by individuals accused of criminal offenses during the period 2005–2012. The study shows that such evidence has reduced charges, mitigated sentences and in general, as stated by the authors, *the range of uses indentified is wide*.

de Kogel and Westgeest[57] analysed Dutch case law (2000–2012) in which neuroscientific or behavioural genetic evidence was introduced.

---

53 Farahany, "Neuroscience and Behavioral Genetics in US Criminal Law: An Empirical Analysis," 485–509.

54 Chandler, "The Use of Neuroscientific Evidence in Canadian Criminal Proceedings," 550–579.

55 Lisa Claydon, "Reforming Automatism and Insanity: Neuroscience and Claims of Lack of Capacity for Control," *Medicine, Science and the Law* 55, no. 3 (2015): 162–167, https://doi.org/10.1177/0025802415579374.

56 Catley and Claydon, "The Use of Neuroscientific Evidence in the Courtroom by Those Accused of Criminal Offenses in England and Wales," 510–549.

57 de Kogel and Westgeest, "Neuroscientific and Behavioral Genetic Information in Criminal Cases in the Netherlands," 580–605.

Alimardani[58] examines the possible integration of neuroscientific findings into the Iranian criminal justice system.

Hafner[59] analysed homicide trials in Slovenia between 1991 and 2015 for the presence and use of neuroscientific evidence.

Stevens[60] reflects on the role of neuroscience in the assessment of criminal responsibility in the South African medico-legal context. The article discusses whether neurological or brain disorders can meet the requirements for the defence of pathological insanity and examines medico-legal and evidentiary issues relating to the presentation of neuroscientific evidence. Stevens also addresses how such evidence can be used not only to assess insanity and criminal responsibility, but also to support mitigation.

Khalid, Lee, and Wall[61] examine the use of neurobiological evidence as a mitigating factor in sentencing in the United States. The authors explore the increasing reliance on neuroimaging, behavioural genetics, and other forms of neuroscientific evidence introduced by the defence to support arguments for reduced punishment, particularly in death penalty cases. They also consider empirical research, sentencing guidelines, and major judicial decisions addressing the legal and ethical challenges associated with the use of such evidence.

2.3. Articles Tackling the Theme of Neuroscience and Criminal Law in *Other Contexts*

Goodenough and Tucker[62] presents historical insights on the emergence of neurolaw. Authors bring a spectrum of examples on how neuroscience can inform and enrich law. What is more, they emphasise that the latter science is still developing and because of opportunities for abuse, should be proceeded cautiously.

---

58 Alimardani, "Neuroscience, Criminal Responsibility and Sentencing in an Islamic Country: Iran," 724–742.

59 Miha Hafner, "Judging Homicide Defendants by Their Brains: An Empirical Study on the Use of Neuroscience in Homicide Trials in Slovenia," *Journal of Law and the Biosciences* 6, no. 1 (2019): 226–254, https://doi.org/10.1093/jlb/lsz006.

60 Stevens, "'My Brain Made Me Do It?' Reflections on the Role of Neuroscience in Assessing Criminal Responsibility – A South African Medico-Legal Perspective," 202–213.

61 Zain Khalid, Ruby Lee and Barry W. Wall, "The Use of Neurobiological Evidence in Sentencing Mitigation," *Behavioral Sciences & the Law* 42, no. 2 (2024): 65–78, https://doi.org/10.1002/bsl.2645.

62 Goodenough and Tucker, "Law and Cognitive Neuroscience," 61–92.

Bottalico and Bruni[63] provide an overview of neuroscientific research on post-traumatic stress disorder and consider how these developments may influence legal practice.

Meynen[64] provides an overview of the emerging field of neurolaw and its particular significance for forensic psychiatry. The author identifies three main areas of neurolaw research: *revision* (rethinking legal practice in the light of neuroscience), *assessment* (for example, using neuroscientific techniques such as MRI to assess defendants) and *intervention* (potential use of brain interventions such as deep brain stimulation).

Ligthart[65] examines the problematic aspects of neuroimaging in the sphere of protection of privacy and in the context of European Convention on Human Rights.

Filipova[66] examines the history of the use of neurotechnologies in jurisprudence as well as the problematics of legal regulation of the latter.

Barsky and Stein[67] examine the intersection between the United Nations Convention on the rights of persons with disabilities, neuroscience and criminal legal capacity. They disagree with a statement that bioscientific evidence of psychocial disability can not be admissible to negate criminal responsibility.

Mrčela and Vuletić[68] analyse the impact of new neurotechnologies and artificial intelligence on the privilege against self-incrimination in criminal proceedings.

Logan et al.[69] explore the emerging field of nutritional criminology and its implications for forensics. They also introduce the concept of the 'legalome'

63 Barbara Bottalico and Tommaso Bruni, "Post Traumatic Stress Disorder, Neuroscience, and the Law," *International Journal of Law and Psychiatry* 35, no. 2 (2012): 112–120, https://doi.org/10.1016/j.ijlp.2011.12.001.

64 Gerben Meynen, "Forensic Psychiatry and Neurolaw: Description, Developments, and Debates," *International Journal of Law and Psychiatry* 65 (2019): 101345, https://doi.org/10.1016/j.ijlp.2018.04.005.

65 Sjors L. T. J. Ligthart, "Coercive Neuroimaging, Criminal Law, and Privacy: A European Perspective," *Journal of Law and the Biosciences* 6, no. 1 (2019): 289–309, https://doi.org/10.1093/jlb/lsz015.

66 Filipova, "Neurotechnologies in Law and Law Enforcement: Past, Present and Future," 32–49.

67 Benjamin A. Barsky and Michael Ashley Stein, "The United Nations Convention on the Rights of Persons with Disabilities, Neuroscience, and Criminal Legal Capacity," *Journal of Law and the Biosciences* 10, no. 1 (2023): lsad010, https://doi.org/10.1093/jlb/lsad010.

68 Igor Vuletić and Marin Mrčela, "Rethinking the Privilege Against Self-Incrimination in Terms of Emerging Neuro-Technology: Comparing the European and United States Perspective," *Croatian Yearbook of European Law and Policy* 19 (2023): 207–223, https://doi.org/10.3935/cyelp.19.2023.504.

69 Alan C. Logan et al., "Beyond Auto-Brewery: Why Dysbiosis and the Legalome Matter to Forensic and Legal Psychology," *Laws* 13, no. 4 (2024): 46, https://doi.org/10.3390/laws13040046.

which refers to the application of microbiome science to criminology and law. They review the evidence linking ultra-processed foods, microbiome dysbiosis and dietary factors to mental disorders, aggression and anti-social behaviour.

Frangi et al.[70] analyse the risks of underinterpretation of neuroimaging data in forensic reports on insanity.

3. Discussion

The conducted analysis showed that the emerging issues of interest in the articles tackling both the neuroscience and criminal law themes include a wide range of questions.

To begin with, neuroscience and its different developments are seen and discussed as a type of important data (evidence) in the field of criminal cases or law in general. In the latter context the issue of neuroimaging emerges. As some authors mention, two types of neuroimaging can be distinguished: structural and functional neuroimaging. Structural neuroimaging technologies (like MRI and CT), show the biological structure of brain, while functional neuroimaging (like fMRI and EEG), measure brains activity. According to Ligthart, mentioned applications can contribute to answering important questions of criminal law, for example, brain-based lie detection; brain-based memory detection; can be used to predict future dangerousness of a person ('neuroprediction') etc. On the other hand, most of neuroimaging applications mainly real-time mind reading are still in their experimental stage.[71] According to Goodenough and Tucker[72] brain scannings experiments raise questions on the theme of consciousness, vegetative states and brain death, as well as coma patients' rights. The latter mentions that the research prepared by Monti et al. has built on the idea that the performance of discrete mental tasks identifiable in the scanner may be a way to enable otherwise noncommunicative patients.

It is interesting that in the analysed articles, the possible use of neuroscientific data is analysed in the very different contexts. For example, according to Bottalico and Bruni[73] neuroscience might be able to provide courts with new tools

70 Camilla Frangi et al., "Under-Interpretation of Neuroimaging Data in Insanity Assessment: A Hidden Risk," *Behavioral Sciences & the Law* 43, no. 5 (2025), https://doi.org/10.1002/bsl.70006.

71 Ligthart, "Coercive Neuroimaging, Criminal Law, and Privacy: A European Perspective," 291-292.

72 Goodenough and Tucker, "Law and Cognitive Neuroscience," 68.

73 Bottalico and Bruni, "Post Traumatic Stress Disorder, Neuroscience, and the Law," 119.

to diagnose post-traumatic stress disorder. However, the mentioned authors also emphasise that the latter, even if likely to become new forms of evidence, are not likely to replace the old behavioural evidence. What is more, whether their reliability is 'high' enough will be decided by judges, whom mentioned authors call 'gate-keepers'. This places considerable responsibility on legal decision-makers, who must assess not only whether neuroscientific evidence can be admitted, but also how reliable and relevant it is for determining legal responsibility. Authors also see a place for neuroscientific data in other spheres. For example, Barsky and Stein[74] argue that brain activity data can help assess decision-making capacity in the context of disability. Other authors, such as Logan et al.[75] examine how advances in fields such as nutritional criminology and microbiome research may affect legal interpretations of behaviour and responsibility. The authors argue that biological factors can contribute to behavioural tendencies associated with offending. However, they stress the need for caution, highlighting the methodological and conceptual challenges involved in using biological explanations in legal evaluations of criminal responsibility. As Danagher[76] points out, due to methodological flaws and replication problems, neurobiological data is not sufficiently reliable to justify the reduction or elimination of legal responsibility. Furthermore, measures of psychopathy are not entirely reliable, and the phenomenon of psychopathy itself is more continuous than clearly defined. This does not align well with the law's binary 'responsible/not responsible' divisions. Therefore, as he notes, caution must be exercised when assessing psychopathy in relation to criminal responsibility.

Frangi et al.[77] mention that although neuroimaging techniques made their entry into the courtroom more than 4 decades ago, the controversy regarding their use for legal purposes is far from being settled. As mentioned by the same authors, the trial of John Hinckley Jr. in 1982 was one of the first to witness neuroimaging. At the same time, this case launched the debate in the academia between proponents and opponents with respect to the use of such techniques in the legal arena. In the said case the influence those scans had on the jury was probably driven by their novelty, rather than by the scientific relevance of the evidence itself.

74 Barsky and Stein, "The United Nations Convention on the Rights of Persons with Disabilities, Neuroscience, and Criminal Legal Capacity," lsad010.

75 Logan et al., "Beyond Auto-Brewery: Why Dysbiosis and the Legalome Matter to Forensic and Legal Psychology," 46.

76 Danagher, "Psychopathy, Neuroscience, and Critical Issues: A Legal Primer," 102139.

77 Frangi et al., "Under-Interpretation of Neuroimaging Data in Insanity Assessment: A Hidden Risk".

The conducted analysis also showed that the regulatory and ethical dimensions in the field of neuroscientific data, are becoming increasingly prominent. Different authors raise various questions related to human rights. Even the possibility of the emergence of new human rights is considered. Suggestions to reformulate the right to freedom of thought in order to ensure adequate protection of 'reading' the brain without consent are voiced. According to some, the right to freedom of thought in accordance with its current understanding will not cover the use of emerging neurotechnologies. As Filipova notices, France was the first country to introduce a special section of legislation dedicated to the regulation of neurotechnologies, restricting the commercial use of neuroimaging technologies. In 2011, a new Chapter IV was included in Book I *On Persons* of the French Civil Code, containing an article titled *Use of brain imaging methods*. It states that *brain imaging methods can only be used for medical or scientific purposes, or as part of a forensic examination*. Another jurisdiction regulating issues related to neurotechnologies, according to the same author, was Chile, whose parliament considered a law on the inclusion of a new group of human rights in the Constitution. These rights aim at protecting the mental integrity and integrity of the individual in general.[78] The use of neuroimaging raises many questions whether it can be applied coercively, for example, to defendants or prisoners in light of privacy considerations. As Ligthart mentions, Article 8 of the ECHR directly protects someone's physical and psychological integrity and his personal data, both of which neuroimaging interferes with. On the other hand, the author argues that most neuroimaging applications yield data, which is, in terms of privacy sensitivity, no more sensitive than data acquired through current methods of criminal investigation, such as compulsory DNA testing and, therefore, some types of coercive neuroimaging will, in general and under certain specific conditions, not contravene the right to privacy as set out in Article 8 of the ECHR. According to the same scholar, other European human rights, such as the privilege against self-incrimination (Article 6 ECHR) and the prohibition of ill-treatment (Article 3 ECHR), may be more promising. What is more, the right to freedom of thought, conscience, and religion (Article 9 ECHR) could come into play.[79]

It can also be seen that neuroscience is compelling the legal system to reconsider what constitutes liability. Claydon[80] highlights this shift in the

78 Filipova, "Neurotechnologies in Law and Law Enforcement: Past, Present and Future," 32–49.

79 Ligthart, "Coercive Neuroimaging, Criminal Law, and Privacy: A European Perspective," 309.

80 Lisa Claydon, "Are There Lessons to Be Learned from a More Scientific Approach to Mental Condition Defences?" *International Journal of Law and Psychiatry* 35, no. 2 (2012): 88–98, https://doi.org/10.1016/j.ijlp.2011.12.002.

context of England and Wales, arguing that the insanity defence remains rooted in nineteenth-century assumptions and does not reflect modern scientific understanding. The author suggests that a more refined approach, such as the Dutch model, which allows graded evaluations of responsibility, might better align legal doctrines with current neuroscientific knowledge. Different authors (see more: Slobogin[81]) question whether the classic concepts of *actus reus* and *mens rea* remain sufficient, is there such a thing as free will, etc.

For example, Burns and Bechara[82] state that neuroscience brings evidence that questions the idea that free will is always intact, and as long as one is cognitively normal, there is no excuse not to be able to choose from wrong or right. Authors suggest that neuroscience can help to reshape legal intuitions towards a more effective and humane justice system and notice, that already some good changes may be seen in the juvenile justice field, for example. Maoz and Yaffe[83] note that important neuroscientific work on self control has emerged in recent years, although very little is known to date about the brain that is relevant to understanding criminal responsibility. On the other hand, there is no reason to believe that neuroscience cannot provide evidence that will challenge our understanding of criminal responsibility. For example, as the authors state, it would be useful to know more about how self-control can be measured; how exactly addiction modulates conscious awareness of risk, etc. Similarly, Gordon and Fondacaro[84] notice that retribution usually provides justification for imposing responsibility, however, according to mentioned scholars, there are alternative consequentialist justifications for imposing responsibility that are more aligned with advances of neuroscience. They suggest abandoning the traditional 'voluntary act' presumption in criminal law and instead a defendant would be held accountable for a 'legally prohibited act'. In such way, according to authors, responsibility is conceptualised as a social construct rather than an internal personal attribute. Coppola states that our adherence (or a lack of adherence) to moral standards depends not only on the planning, attentional, or inhibition abilities but also is driven by the capacity to 'feel' the interpersonal significance of our actions. What is more, according to said scholar, emotions, notably certain emotional capacities such as capacity for empathic responding,

81 Slobogin, "Neuroscience Nuance: Dissecting the Relevance of Neuroscience in Adjudicating Criminal Culpability," 577–593.

82 Burns and Bechara, "Decision Making and Free Will: A Neuroscientific Perspective," 263–280.

83 Maoz and Yaffe, "What Does Recent Neuroscience Tell Us about Criminal Responsibility?" 120–139.

84 Gordon and Fondacaro, "Rethinking the Voluntary Act Requirement: Implications from Neuroscience and Behavioral Science Research," 240–254.

should be afforded normative weight within criminal responsibility.[85] Finally, it is worth quoting at greater length the position of List,[86] who argues that the neuroscientific image of human beings undermines the assumption that people possess the kind of control over their actions required for holding them responsible. However, according to this scholar, a system's macro-behaviour may be indeterministic even when its micro-behaviour is deterministic, so the determinism–indeterminism distinction is best viewed as level-relative rather than level-independent. Lower-level determinism can coexist with higher-level indeterminism, and even the converse is possible.

Neuroscience appears in legal articles not only as a valuable source for analysing free will in cases of committed crimes, but also in the broader context of social decision-making.

For example, it serves as a useful tool for exploring juvenile delinquency. Casey et al. analysed the neuroscientific development of minors and aspects of justice concerning them, emphasising that minors are not simply lesser adults. These scholars argue against a 'one-size-fits-all' approach, as different cognitive and psychosocial abilities and brain circuits mature at different times. Developmental changes have important implications for the treatment of juveniles and prompt a reconsideration of how young people at different stages – such as early versus late adolescence, or late adolescence versus young adulthood – are treated.[87] Similar nuances are discussed by Petoft et al.[88] who emphasise that 21st-century discoveries about human cognitive development (the growth of perception, thinking, and reasoning) have significantly changed both the definition of a child and the models in legal systems for addressing adolescent delinquency. They stress that the law must be informed by neuroscience, as cognitive development determines decision-making ability.

It is worth noting that many articles addressing the theme of neuroscience and criminal law focus on the practices of specific countries. Interestingly, this topic is relevant in culturally and geographically diverse locations. Studies from various countries show that neuroscientific findings influence sentencing to varying degrees. Research has demonstrated that neurobiological or neuroscientific

85 Coppola, "We Are More Than Our Executive Functions: On the Emotional and Situational Aspects of Criminal Responsibility and Punishment," 257.

86 List, "Mechanical Choices: A Compatibilist Libertarian Response," 109–131.

87 Casey et al., "Healthy Development as a Human Right: Insights from Developmental Neuroscience for Youth Justice," 203–222.

88 Petoft, Abbasi and Zali, "Toward Children's Cognitive Development from the Perspective of Neurolaw: Implications of *Roper v. Simmons*," 144.

evidence can reduce sentences, shorten prison terms, or overturn convictions. Furthermore, analyses conducted by scholars from different countries already reveal some differences in the intersection of criminal law and neuroscience.

For example, in the US, the number of judicial opinions discussing the use of neurobiological evidence by criminal defendants is increasing year on year, and contrary to popular belief, many cases are not capital homicide cases. As Farahany[89] notes, neurobiological evidence is also introduced in cases of drug possession or trafficking, violent assaults, robbery, fraud, and so on. The author argues against banning neurobiological evidence and instead calls for a more nuanced dialogue between neuroscientists, legal actors, and the public. Similarly, Khalid, Lee and Wall[90] note that neurobiological evidence is becoming more significant in U.S. criminal proceedings, especially during sentencing. Such evidence, which may include neuroimaging and other biological data, can be presented by defence counsel to argue for a lighter sentence. However, they observe that its legal impact depends greatly on the specific circumstances of the case, the strength of expert testimony, and other mitigating factors.

Canadian courts consider many types of neuroscientific evidence. They have examined evidence such as prenatal alcohol exposure (fetal alcohol spectrum disorder, fetal alcohol effects, or alcohol-related neurodevelopmental disorder), traumatic brain injury, and neuropsychological testing, particularly during sentencing. Neuropsychological testing, including assessments of IQ, memory, executive function, and other tests that identify abnormalities or defects in cognitive functioning often associated with brain damage, is not a novel form of neuroscience evidence, as Chandler states. However, neuroscientific evidence is a double-edged sword: while suggesting diminished capacity can mitigate responsibility, it also raises concerns about the offender's risk and potential dangerousness in the future.[91]

In the case of England and Wales, as Catley and Claydon[92] state, where brain scan evidence is used, it is structural rather than functional brain scan images. Furthermore, according to these scholars, neuroscientific evidence has been central to a number of appeals to reduce murder convictions to manslaughter; has assisted defendants in arguing that they were not fit to stand trial; has

89 Farahany, "Neuroscience and Behavioral Genetics in US Criminal Law: An Empirical Analysis," 492.

90 Khalid, Lee, and Wall, "The Use of Neurobiological Evidence in Sentencing Mitigation," 65–78.

91 Chandler, "The Use of Neuroscientific Evidence in Canadian Criminal Proceedings," 550–579.

92 Catley and Claydon, "The Use of Neuroscientific Evidence in the Courtroom by Those Accused of Criminal Offenses in England and Wales," 543–544.

been used to cast doubt on the credibility of witnesses (for example, in several cases relating to childhood amnesia); and has influenced sentence reduction, among other effects. On the other hand, the authors describe the impact as not revolutionary, as neuroscience has not provided new defences that did not previously exist.

In the case of the Netherlands, de Kogel and Westgeest note that in the majority of cases, neuroscientific information was introduced as mitigating evidence during sentencing. As the authors observe, this evidence – mostly MRI, EEG, or neuropsychological tests – was usually presented alongside psychiatric and psychological reports to assess the defendant's mental state, as well as reports from the probation service. The authors described it as *a component of a larger picture*.[93] Furthermore, the authors noted that some uses of neuroscientific information seen in criminal cases in other countries were not found in any Dutch cases. For example, physiological 'lie-detection' or 'fMRI-lie detection' (the scientific basis for using these methods as evidence in court is considered too weak); in some cases in the USA, information about the 'emotional brain', such as dysfunction of the amygdala–hippocampal complex, is introduced in relation to psychopathy, whereas in the Netherlands, such information was not used in any of the cases identified; in contrast to Canada, there were no cases involving a defendant diagnosed with fetal alcohol syndrome; and in contrast to Italy, the authors found no cases where defendants had been tested for the MAO gene or other candidate genes.[94]

In Slovenia, as Hafner mentions, neuro-evidence is referred to in almost every fifth homicide trial, most frequently through neuropsychological testing, while structural neuroimaging and electroencephalography are used less often, and functional imaging is not used at all. The most common neurological conditions among defendants are traumatic brain injury and brain damage caused by long-term alcohol or drug abuse. Evidence about defendants' brains affects the determination of culpability (for example, insanity) and diminished capacity, which in turn significantly influences sentencing. Neuroscience evidence is generally used to mitigate sentences and often supports decisions on compulsory psychiatric treatment. According to the author, neuro-evidence is more prevalent in homicide trials in Slovenia compared to the USA; the study also attests to the strong influence of neuro-evidence in murder and manslaughter trials in

93 de Kogel and Westgeest, "Neuroscientific and Behavioral Genetic Information in Criminal Cases in the Netherlands," 580–605.

94 de Kogel and Westgeest, "Neuroscientific and Behavioral Genetic Information in Criminal Cases in the Netherlands," 600–602.

Slovenia. Furthermore, the identified impact mechanism concerning criminal sanctions suggests a different pattern in neuroscience-influenced decision-making in continental criminal law systems compared to common law legal traditions, as in the latter, information on the defendant's brain abnormalities typically comes into play in sentencing decisions independently.[95]

Alimardani[96] highlights that neuroscience could play an important role in Iran's criminal justice system, for purposes such as establishing the insanity defence, or mitigating or determining punishment. However, the author also notes that without structural changes, the transformative potential of neuroscience in Iranian law will remain limited.

Overall, while neuroscience provides valuable insights into human behaviour, its integration into criminal law requires caution due to ongoing methodological limitations and the risk of overinterpreting scientific findings in legal contexts.

4. Findings

The scientific articles analysed indicate that neuroscience is influencing the field of criminal law, particularly regarding responsibility and punishment. However, scientists do not share a unified view on the extent of this impact, either now or in the near future. Some claim it is highly significant and represents a paradigm shift by reshaping certain legal concepts, while others consider its impact to be minor. For example, some argue that neuroscience introduces new types of evidence in courtrooms, whereas others contend that neuroimaging does not add significant value to existing forms of evidence. Overall, the analysis identified a wide range of questions arising at the intersection of criminal law and neuroscience, including, but not limited to: new types of evidence; the legal regulation of neuroscientific evidence (its admissibility, reliability, and associated challenges); neuroscientific evidence in relation to the right to privacy, the right to remain silent, and other human rights, or potentially emerging new human rights; free will; juvenile delinquency; human decision-making; and punishment.

It is likely that the future will bring more dialogue and agreement both among scientists and between scientists and legal practitioners. Future research could expand this analysis to better understand human behaviour and examine

95 Hafner, "Judging Homicide Defendants by Their Brains: An Empirical Study on the Use of Neuroscience in Homicide Trials in Slovenia," 226–254.

96 Alimardani, "Neuroscience, Criminal Responsibility and Sentencing in an Islamic Country: Iran," 724–742.

changes in criminal law. It remains to be seen which approach is preferable, but any deeper understanding can help us live better and achieve greater justice for all, with justice fundamentally based on a deeper understanding of human beings and their behaviour.

References

Alimardani, Armin. "Neuroscience, Criminal Responsibility and Sentencing in an Islamic Country: Iran." *Journal of Law and the Biosciences* 5, no. 3 (2018): 724–742. https://doi.org/10.1093/jlb/lsy024.

Appelbaum, Paul S. "Law & Psychiatry: The New Lie Detectors: Neuroscience, Deception, and the Courts." *Psychiatric Services* 58, no. 4 (2007): 460–462. https://doi.org/10.1176/ps.2007.58.4.460.

Barsky, Benjamin A., and Michael Ashley Stein. "The United Nations Convention on the Rights of Persons with Disabilities, Neuroscience, and Criminal Legal Capacity." *Journal of Law and the Biosciences* 10, no. 1 (2023): lsad010. https://doi.org/10.1093/jlb/lsad010.

Becht, Olivier. *The Brain-Computer Interface: New Rights or New Threats to Fundamental Freedoms?*. Committee on Legal Affairs and Human Rights. Doc. 15147. September 24, 2020.

Bottalico, Barbara, and Tommaso Bruni. "Post Traumatic Stress Disorder, Neuroscience, and the Law." *International Journal of Law and Psychiatry* 35, no. 2 (2012): 112–120. https://doi.org/10.1016/j.ijlp.2011.12.001.

Brown, Teneille, and Emily Murphy. "Through a Scanner Darkly: Functional Neuroimaging as Evidence of a Criminal Defendant's Past Mental States." *Stanford Law Review* 62, no. 4 (2010): 1119–1168.

Burns, Kelly, and Antoine Bechara. "Decision Making and Free Will: A Neuroscience Perspective." *Behavioral Sciences & the Law* 25, no. 2 (2007): 263–280. https://doi.org/10.1002/bsl.751.

Casey, B. J., Kim Taylor-Thompson, Estée Rubien-Thomas, Maria Robbins, and Arielle Baskin-Sommers. "Healthy Development as a Human Right: Insights from Developmental Neuroscience for Youth Justice." *Annual Review of Law and Social Science* 16 (2020): 203–222. https://doi.org/10.1146/annurev-lawsocsci-101317–031101.

Catley, Paul, and Lisa Claydon. "The Use of Neuroscientific Evidence in the Courtroom by Those Accused of Criminal Offenses in England and Wales." *Journal of Law and the Biosciences* 2, no. 3 (2015): 510–549. https://doi.org/10.1093/jlb/lsv025.

Chandler, Jennifer A. "The Use of Neuroscientific Evidence in Canadian Criminal Proceedings." *Journal of Law and the Biosciences* 2, no. 3 (2015): 550–579. https://doi.org/10.1093/jlb/lsv026.

Claydon, Lisa. "Reforming Automatism and Insanity: Neuroscience and Claims of Lack of Capacity for Control." *Medicine, Science and the Law* 55, no. 3 (2015): 162–167. https://doi.org/10.1177/0025802415579374.

Claydon, Lisa. "Are There Lessons to Be Learned from a More Scientific Approach to Mental Condition Defences?" *International Journal of Law and Psychiatry* 35, no. 2 (2012): 88–98. https://doi.org/10.1016/j.ijlp.2011.12.002.

Coppola, Federica. "We Are More Than Our Executive Functions: On the Emotional and Situational Aspects of Criminal Responsibility and Punishment." *Criminal Law and Philosophy* 16 (2022): 253–266. https://doi.org/10.1007/s11572-021-09594-5.

Danagher, Luke. "Psychopathy, Neuroscience, and Critical Issues: A Legal Primer." *International Journal of Law and Psychiatry* 103 (2025): 102139. https://doi.org/10.1016/j.ijlp.2025.102139.

de Kogel, C. H., and E. J. M. C. Westgeest. "Neuroscientific and Behavioral Genetic Information in Criminal Cases in the Netherlands." *Journal of Law and the Biosciences* 2, no. 3 (2015): 580–605. https://doi.org/10.1093/jlb/lsv024.

Denno, Deborah W. "Courts' Increasing Consideration of Behavioral Genetics Evidence in Criminal Cases: Results of a Longitudinal Study." *Michigan State Law Review* (2011): 967–1047. https://ir.lawnet.fordham.edu/faculty_scholarship/709.

Farahany, Nita A. "Neuroscience and Behavioral Genetics in US Criminal Law: An Empirical Analysis." *Journal of Law and the Biosciences* 2, no. 3 (2015): 485–509. https://doi.org/10.1093/jlb/lsv059.

Filipova, Irina A. "Neurotechnologies in Law and Law Enforcement: Past, Present and Future." *Pravoprimenenie – Law Enforcement Review* 6, no. 2 (2022): 32–49. https://doi.org/10.52468/2542–1514.2022.6(2).32-49.

Frangi, Camilla, Alexa Schincariol, Pietro Pietrini, Giuseppe Sartori, Stefano Ferracuti, and Cristina Scarpazza. "Under-Interpretation of Neuroimaging Data in Insanity Assessment: A Hidden Risk." *Behavioral Sciences & the Law* 43, no. 5 (2025). https://doi.org/10.1002/bsl.70006.

Gaudet, Lyn M., and Gary E. Marchant. "Under the Radar: Neuroimaging Evidence in the Criminal Courtroom." *Drake Law Review* 64 (2016): 577–741. https://ssrn.com/abstract=2838996.

Gazzaniga, Michael S. "The Law and Neuroscience." *Neuron* 60, no. 3 (2008): 412–415. https://doi.org/10.1016/j.neuron.2008.10.022.

Ginther, Matthew. "Neuroscience or Neurospeculation? Peer Commentary on Four Articles Examining the Prevalence of Neuroscience in Criminal Cases around the

World." *Journal of Law and the Biosciences* 3, no. 2 (2016): 324–329. https://doi.org/10.1093/jlb/lsw030.

Goodenough, Oliver R., and Micaela Tucker. "Law and Cognitive Neuroscience." *Annual Review Law and Social Science* 6 (2010): 61–92. https://doi.org/10.1146/annurev.lawsocsci.093008.131523.

Gordon, Natalie S., and Mark R. Fondacaro. "Rethinking the Voluntary Act Requirement: Implications from Neuroscience and Behavioral Science Research." *Behavioral Sciences & the Law* 36, no. 4 (2018): 426–436. https://doi.org/10.1002/bsl.2352.

Hafner, Miha. "Judging Homicide Defendants by Their Brains: An Empirical Study on the Use of Neuroscience in Homicide Trials in Slovenia." *Journal of Law and the Biosciences* 6, no. 1 (2019): 226–254. https://doi.org/10.1093/jlb/lsz006.

Jones, Owen D., and Francis X. Shen. "Law and Neuroscience in the United States." In *International Neurolaw: A Comparative Analysis*, edited by T. M. Spranger. Springer–Verlag, 2012. https://ssrn.com/abstract=2001085.

Khalid, Zain, Ruby Lee, and Barry W. Wall. "The Use of Neurobiological Evidence in Sentencing Mitigation." *Behavioral Sciences & the Law* 42, no. 2 (2024): 65–78. https://doi.org/10.1002/bsl.2645.

Kolber, Adam. "Will There Be a Neurolaw Revolution?" *Indiana Law Journal* 89, no. 2 (2014). https://www.repository.law.indiana.edu/ilj/vol89/iss2/7.

Langleben, Daniel D., Dan F. X. Willard, and Jane C. Moriarty. "Brain Imaging of Deception." In *Neuroimaging in Forensic Psychiatry: From the Clinic to the Courtroom*, edited by Joseph R. Simpson. John Wiley & Sons, 2012. https://doi.org/10.1002/9781119968900.ch13.

Ligthart, Sjors L. T. J. "Coercive Neuroimaging, Criminal Law, and Privacy: A European Perspective." *Journal of Law and the Biosciences* 6, no. 1 (2019): 289–309. https://doi.org/10.1093/jlb/lsz015.

List, Christian. "Mechanical Choices: A Compatibilist Libertarian Response." *Criminal Law and Philosophy* 18 (2024): 109–131. https://doi.org/10.1007/s11572-023-09671-x.

Logan, Alan C., Susan L. Prescott, Erica M. LaFata, Jeffrey J. Nicholson, and Christopher A. Lowry. "Beyond Auto-Brewery: Why Dysbiosis and the Legalome Matter to Forensic and Legal Psychology." *Laws* 13, no. 4 (2024): 46–69. https://doi.org/10.3390/laws13040046.

Maoz, Uri, and Gideon Yaffe. "What Does Recent Neuroscience Tell Us about Criminal Responsibility?" *Journal of Law and the Biosciences* 3, no. 1 (2016): 120–139. https://doi.org/10.1093/jlb/lsv051.

Meixner Jr., John B. "Applications of Neuroscience in Criminal Law: Legal and Methodological Issues." *Current Neurology and Neuroscience Reports* 15 (2015): 513–522. https://ssrn.com/abstract=2536580.

Meynen, Gerben. "Forensic Psychiatry and Neurolaw: Description, Developments, and Debates." *International Journal of Law and Psychiatry* 65 (2019): 101345.https://doi.org/10.1016/j.ijlp.2018.04.005.

Moriarty, Jane Campbell. "Visions of Deception: Neuroimages and the Search for Truth." *Akron Law Review* 42, no. 3 (2009): 739–761.

OECD. *Recommendation of the Council on Responsible Innovation in Neurotechnology*. OECD/LEGAL/0457.

Petoft, Arian, Mahmoud Abbasi, and Alireza Zali. "Toward Children's Cognitive Development from the Perspective of Neurolaw: Implications of *Roper v. Simmons*." *Psychiatry, Psychology and Law* 30, no. 2 (2023): 144–160. https://doi.org/10.1080/13218719.2021.2003267.

The Society for Neuroscience. Accessed May 12, 2026. http://www.sfn.org/.

Seaman, Julie. "Black Boxes: fMRI Lie Detection and the Role of the Jury." *Akron Law Review* 42, no. 3 (2009): 931–939. https://ideaexchange.uakron.edu/akronlawreview/vol42/iss3/9.

Shen, Francis X. "Neuroscience, Mental Privacy, and the Law." *Harvard Journal of Law & Public Policy* 36 (2013): 653–713. https://scholarship.law.umn.edu/faculty_articles/599.

Shen, Francis X. "The Overlooked History of Neurolaw." *Fordham Law Review* 84 (2016): 667–695. https://ssrn.com/abstract=2899031.

Shen, Francis X. "Law and Neuroscience 2.0." *Arizona State Law Journal* 48 (2017): 1043–1086. https://ssrn.com/abstract=2942499.

Slobogin, Christopher. "Neuroscience Nuance: Dissecting the Relevance of Neuroscience in Adjudicating Criminal Culpability." *Journal of Law and the Biosciences* 4, no. 3 (2017): 577–593. https://doi.org/10.1093/jlb/lsx033.

Spranger, Tade Matthias, ed. *International Neurolaw: A Comparative Analysis*. Springer, 2012. https://doi.org/10.1007/978-3-642-21541-4.

Squire, Larry R., Darwin Berg, Floyd E. Bloom, Sascha du Lac, Airvan Ghosh, and Nicholas C. Spitzer, eds. *Fundamental Neuroscience*. Elsevier, 2013.

Stevens, Geert Philip. "'My Brain Made Me Do It?' Reflections on the Role of Neuroscience in Assessing Criminal Responsibility – A South African Medico-Legal Perspective." *Psychiatry, Psychology and Law* 27, no. 2 (2020): 202–213. https://doi.org/10.1080/13218719.2019.1688131.

The MacArthur Foundation Research Network on Law and Neuroscience. Accessed May 12, 2026. https://lawneuro.org/.

Valančienė, Dovilė. "Neuroteisė: keletas fundamentalių įžvalgų apie teisminių sprendimų priėmimą." *Teisė* 104 (2017): 144–158. https://doi.org/10.15388/Teise.2017.104.10850.

Vuletić, Igor, Marin Mrčela. “Rethinking the Privilege Against Self-Incrimination in Terms of Emerging Neuro-Technology: Comparing the European and United States Perspective.” *Croatian Yearbook of European Law and Policy* 19 (2023): 207–223. https://doi.org/10.3935/cyelp.19.2023.504.

Wagner, Anthony. “Can Neuroscience Identify Lies?” In *A Judge’s Guide to Neuroscience: A Concise Introduction*. University of California, 2010.

Wolpe, Paul Root, Kenneth R. Foster, and Daniel D. Langleben. “Emerging Neurotechnologies for Lie-Detection: Promises and Perils.” *The American Journal of Bioethics* 5, no. 2 (2005): 39–49.

Abstract

The Intersection of Neuroscience and Criminal Law: The Analysis of Emerging Themes

Neuroscience is sometimes defined as the science that seeks to understand human thought, emotions, and behaviour. It involves the study of the brain and nervous system, aiming to explore how brain function affects behaviour. This article aims to identify the main topics that appear in legal articles addressing the theme of neuroscience and criminal law. To achieve this, a narrative approach combined with thematic analysis was used to summarise the main topics discussed in the literature analysed. A systematic literature review was conducted by searching the Web of Science (WoS) database (Web of Science Core Collection) using the search terms ‘criminal law’ and ‘neuroscience’, covering the period 1992–2026, and including all fields (the ‘Web of Science Categories’ filter was applied). This article is based on 27 selected articles. The scientific articles analysed indicate that neuroscience is influencing the field of criminal law, particularly regarding responsibility and punishment. However, scientists do not share a unified view on the extent of this impact, either now or in the near future. Some claim it is highly significant and represents a paradigm shift by reshaping certain legal concepts, while others consider its impact to be minor. It is likely that the future will bring more dialogue and agreement both among scientists and between scientists and legal practitioners. Future research could expand this analysis to better understand human behaviour and examine changes in criminal law.

Keywords: neuroscience, criminal law, responsibility, evidence, decision making

Santrauka

Neuromokslo ir baudžiamosios teisės sankirta: naujų temų analizė

Neuromokslas kartais apibrėžiamas kaip mokslas, siekiantis suprasti žmogaus mintis, emocijas ir elgesį. Tai apima smegenų ir nervų sistemos tyrimą, siekiant išsiaiškinti, kaip smegenų funkcija veikia elgesį. Šio straipsnio tikslas – nustatyti pagrindines temas, pateikiamas teisiniuose straipsniuose, nagrinėjančiuose neuromokslo ir baudžiamosios teisės sąsajas. Siekiant šio tikslo, pagrindinės analizuojamoje literatūroje aptariamos temos buvo apibendrintos taikant naratyvinį metodą, derinamą su temine analize. Sisteminė literatūros apžvalga atlikta ieškant Web of Science (WoS) duomenų bazėje (Web of Science Core Collection), naudojant paieškos terminus *baudžiamoji teisė* ir *neuromokslas*, apimant 1992–2026 m. laikotarpį ir visas sritis (taikytas „Web of Science Categories“ filtras). Straipsnis parengtas remiantis 27 atrinktais straipsniais. Analizuojami moksliniai tyrimai rodo, kad neuromokslai daro įtaką baudžiamosios teisės sričiai, ypač atsakomybės ir bausmės klausimams. Tačiau mokslininkai neturi vieningos nuomonės dėl šio poveikio masto nei dabartyje, nei artimiausioje ateityje. Vieni teigia, kad poveikis yra labai reikšmingas ir rodo paradigmos pokytį, pertvarkant tam tikras teisines sąvokas, kiti mano, kad šis poveikis nėra labai didelis ar reikšmingas. Tikėtina, kad ateityje bus daugiau dialogo ir susitarimo tiek tarp mokslininkų, tiek tarp mokslininkų ir praktikų teisininkų. Būsimi tyrimai galėtų išplėsti šią analizę, kad būtų geriau suprastas žmonių elgesys ir ištirti baudžiamosios teisės pokyčiai.

Pagrindiniai žodžiai: neuromokslas, baudžiamoji teisė, atsakomybė, įrodymai, sprendimų priėmimas

Part III



National And International Court Jurisprudence As Sources of Applicable Standards

The Intersections of Criminal, Administrative and Civil Law:
International and National Contexts, pp. 177–199
https://doi.org/10.12797/9788383685328.08

Donatas Murauskas
Vilnius University, Faculty of Law
donatas.murauskas@tf.vu.lt

Criminal, Administrative or Civil Remedies? Positive Obligations and the Limits of State Response to Hate Speech Under the ECHR

1. Introduction

The notion of 'general context' (*contexte général*) has emerged as a decisive factor in the case law of the European Court of Human Rights (ECtHR). It played a central role in *Z.B. v. France*,[1] where the Court found no violation of Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms (Convention). In that case, the applicant had been convicted for glorifying crimes of intentional killing after displaying slogans with terrorist connotations 'I am a bomb' and 'Jihad, born on 11 September' on a T-shirt given to his three-year-old nephew, referencing the child's name and date of birth. The Court's reliance on the broader context raises a fundamental question: can 'general context' serve as a determining factor in justifying the imposition of criminal liability, even in situations that might otherwise be perceived as tasteless or ill-judged humour?

This question is closely linked to a broader doctrinal issue: what is the relationship between states' positive obligations to provide effective remedies against hate speech and their margin of appreciation in defining and regulating unlawful expression? This paper explores the evolving and increasingly complex understanding of hate speech in the Court's jurisprudence, with particular

[1] European Court of Human Rights, case of Z.B. v. France, application no. 46883/15, September 2, 2021.

attention to its implications for national criminal law. More specifically, it asks what types of liability the Convention requires member states to establish in response to hate speech, and why it is necessary for domestic legal systems to develop clear and differentiated frameworks in light of these developments.

The inquiry operates on a doctrinal and practice level. Although from a theoretical perspective, we may ask whether a legal moralist justification, punishing individuals for immoral conduct, is sufficient to support the enactment of criminal laws,[2] Douglas Husak challenges this position in his work *Overcriminalization*, questioning, among other things, the legitimacy of state intervention in matters that may fall within the sphere of private conduct.[3] These concerns are particularly relevant in the context of the Court's expanding case law on hate speech, which increasingly broadens the responsibilities of member states, even in areas where the limits of permissible speech remain uncertain.

The scope of this paper is therefore to examine the rationale behind different liability regimes applicable to hate-motivated speech in light of the Court's jurisprudence. Positive obligations in this field are primarily developed under Article 8 of the Convention, as they arise in situations where individuals complain about insufficient protection against hate speech. However, as will be shown, Article 10 has become equally important in shaping the contours of these obligations, particularly through cases assessing the legitimacy of restrictions on expression.

This study is timely and significant considering contemporary challenges, including the rise of increasingly radicalised forms of speech. It is especially relevant for Central and Eastern European countries, which have previously faced issues of under-enforcement, often grounded in a strong commitment to liberal conceptions of free speech and a degree of societal tolerance toward certain forms of harmful expression.[4]

Inspired by the work of Natalie Alkiviadou, particularly her book *Hate Speech and the European Court of Human Rights*,[5] in this paper I argue that the Court's evolving approach necessitates more precise and context-sensitive domestic

---

2 Douglas Husak, "Alternative Theories of Criminalization," in *Overcriminalization: The Limits of the Criminal Law* (Oxford University Press, 2008), 197, https://doi.org/10.1093/acprof:oso/9780195328714.003.0004.

3 Husak, "Alternative Theories of Criminalization," 199.

4 Uladzislau Belavusau, "Hate Speech and Constitutional Democracy in Eastern Europe: Transitional and Militant? (Czech Republic, Hungary and Poland)," *Israel Law Review* 47, no. 1 (2014): 60, https://doi.org/10.1017/S0021223713000241.

5 Natalie Alkiviadou, *Hate Speech and the European Court of Human Rights* (Routledge, 2025), https://doi.org/10.4324/9781003560548.

regulation of hate speech. Such regulation should aim to reduce excessive discretion on the part of law enforcement authorities and ensure greater legal certainty.

The paper proceeds as follows. First, I outline the development of positive obligations related to hate speech in the Court's case law. Second, I examine how the Court approaches the imposition of criminal liability in this context. Third, I analyse three key jurisprudential developments that create tensions with the use of criminal law to address hate speech. Finally, I discuss the importance for national authorities of adopting clear and differentiated legal frameworks capable of addressing hate speech in a coherent and foreseeable manner.

2. Positive Obligations of States to Protect Victims from Hate Speech

The Court's approach on speech had developed and now could be contrasted with the value-neutral freedom of speech grounded approach of the United States Supreme Court.[6] And this could be understandable. The experience of the Holocaust and the totalitarian Communism influenced the way the speech restrictions are perceived on two sides of Atlantic, the European approach leaning towards rights' restrictions in certain contexts.[7]

Although the violation of Article 8 on individuals is the framework to look into possible obligations to protect individuals from such speech, it is the reverse context, namely Article 10 and the cases on restrictions on speeches that elucidated what the prohibited speech may look like. However, this is not entirely clear. In the *Lilliendahl v Iceland* the Court tried to delineate the forms of hate speech, the first category of hate speech consists of what the Court described as the 'gravest forms of hate speech', which are entirely excluded from protection under Article 10. The second category encompasses 'less grave forms of hate speech', which, while not automatically excluded from Article 10, 'may be restricted by Contracting States'.[8] The Court made no further elaboration

6 Theo Tsomidis, "Freedom of Expression in Turbulent Times – Comparative Approaches to Dangerous Speech: The ECtHR and the US Supreme Court," *International Journal of Human Rights* 26, no. 3 (2022): 392, https://doi.org/10.1080/13642987.2021.1928084.

7 Jacob Mchangama and Natalie Alkiviadou, "Hate Speech and the European Court of Human Rights: Whatever Happened to the Right to Offend, Shock or Disturb?" *Human Rights Law Review* 21, no. 4 (2021): 1012, https://doi.org/10.1093/hrlr/ngab015.

8 European Court of Human Rights, case of Lilliendahl v. Iceland, application no. 29297/18, June 22, 2018, paras. 34–35; see also Alkiviadou, *Hate Speech*.

of what this context of permitted restriction may be, something which would have been expected given the fundamental nature of free speech in addition to the very low threshold attached to phenomena such as insult or ridicule.[9]

Framing hate speech from the standpoint of Article 8, that is, the victim side of the speech act, the development of the ECtHR case-law starts from the Grand Chamber case *Aksu v. Turkey*,[10] where the Court accepted that negative stereotypes about Roma could fall within Article 8 (private life) because they affect identity and dignity. The Court raised a clear notion of *positive obligation under Article 8 to protect the applicant's private life from alleged interference by a third party, namely the author of the book* (para 61).

In *Beizaras and Levickas v. Lithuania*,[11] the Court found that the hateful comments directed at the applicants and at the homosexual community more broadly were driven by prejudice against that group. It further held that this same discriminatory mindset underpinned the failure of the relevant public authorities to fulfil their positive obligation to effectively investigate whether those comments amounted to incitement to hatred and violence. Natalie Alkiviadou underlines that this judgment represents an important development in extending states' positive obligations in cases of hate speech involving identifiable victims.[12]

By 2021, the ECtHR further developed this line of reasoning in a series of cases against Bulgaria, addressing situations in which hate speech was directed at vulnerable groups, particularly Jews and Roma, but without identifying specific individual victims. In *Behar and Gutman v. Bulgaria*[13] and *Budinova and Chaprazov v. Bulgaria*,[14] the Court recognised that harmful expression targeting entire communities can, in itself, engage state responsibility under the Convention. It emphasised that sweeping negative stereotyping and generalised hostile statements about such groups are capable of undermining their dignity and security, even in the absence of individually identifiable victims. Building on its earlier case law, the Court thus extended the scope of protection to encompass

9 Mchangama and Alkiviadou, "Hate Speech," 1017.

10 European Court of Human Rights, case of Aksu v. Turkey, applications nos. 4149/04 and 41029/04, March 15, 2012.

11 European Court of Human Rights, case of Beizaras and Levickas v. Lithuania, application no. 41288/15, January 14, 2020.

12 Alkiviadou, *Hate Speech*.

13 European Court of Human Rights, case of Behar and Gutman v. Bulgaria, application no. 29335/13, May 16, 2021.

14 European Court of Human Rights, case of Budinova and Chaprazov v. Bulgaria, application no. 12567/13, May 16, 2021.

collective harm, finding violations where domestic authorities failed to respond adequately to public statements that fostered intolerance and discrimination. These judgements marked a significant step in acknowledging that hate speech can produce serious societal consequences beyond direct, individualised harm.[15]

In *Minasyan and Others v. Armenia*[16] the Court provided a clear articulation of states' positive obligations to protect individuals' dignity against hate speech. The Court found that the impugned articles targeted the applicants in a manner that reinforced negative stereotypes and encouraged discrimination against them. The judgment is of fundamental importance for the conceptual understanding of hate speech. The Court clarified that individuals may be targeted not only because of their own inherent characteristics, but also due to their association with a protected group or the perception that they share characteristics with such a group. In this case, the applicants were human rights defenders, not members of the LGBT community. In this way, the Court broadened the scope of state responsibility in addressing discrimination and protecting individuals from stigma based on perceived identity.[17]

In balancing the right to respect for private life under Article 8 of the Convention and the right to freedom of expression under Article 10 of the Convention, the Court reiterated that neither right has a hierarchical priority. Instead, they must be carefully weighed in light of the specific circumstances of each case. However, it also emphasised a key limiting principle: expressions that amount to hate speech or incitement to discrimination do not benefit from the protection of Article 10.

3. What Forms of Liability Does the ECtHR Require from Member States?

After tracing the expanding understanding of hate speech and the corresponding development of positive obligations for member states in the case law of the Court, it becomes necessary to consider a further question: whether, and to

15 Natalie Alkiviadou, "Hate Speech, Positive Obligations and Free Speech: ECtHR's Expanding Framework in Minasyan and Others v. Armenia," *Strasbourg Observers*, March 7, 2025, https://strasbourgobservers.com/2025/03/07/hate-speech-positive-obligations-and-free-speech-the-ecthrs-expanding-framework-in-minasyan-and-others-v-armenia-2025/.

16 European Court of Human Rights, case of Minasyan and Others v. Armenia, application no. 59180/15, March 7, 2025.

17 Natalie Alkiviadou, "Hate Speech, Positive Obligations and Free Speech".

what extent, these obligations require states to adopt specific forms of liability in their domestic legal systems?

In *Király and Dömötör v. Hungary*,[18] the Court began to clarify the scope of the state's duty to safeguard individual integrity under Article 8 of the Convention. The case is significant because it moves beyond the recognition of harm and focuses on the type of legal response required from the state. In doing so, the Court relied on the Grand Chamber judgment in *Söderman v. Sweden*,[19] which provides important guidance on the nature of positive obligations.

In *Söderman*, the Grand Chamber explained that, in cases involving less serious acts between private individuals, particularly those affecting psychological integrity, the state's obligation to ensure effective protection under Article 8 does not necessarily require the adoption of criminal-law provisions specifically addressing the conduct in question. Instead, it may be sufficient for the state to maintain and effectively apply a legal framework that includes civil-law remedies, provided that these remedies are capable of offering adequate and practical protection.[20]

Building on this reasoning, *Király and Dömötör* judgement suggests that, even in the context of harmful expression such as hate speech, the Convention does not automatically mandate criminal liability. Rather, what is required is an effective legal framework, whether criminal, civil, or a combination of both that is capable of addressing the harm and protecting the dignity and integrity of those affected.[21]

In *Király and Dömötör v. Hungary*, the Court examined the authorities' response to anti-Roma protests held in a Roma neighbourhood, which involved racist demonstrations and incidents of violence. The Court found that the shortcomings in the criminal investigation, particularly the authorities' failure to assess events in their broader context and to address their discriminatory dimension, meant that the applicants were not afforded adequate protection of their right to psychological integrity under Article 8 of the Convention. A key aspect of the judgement was the Court's criticism of the lack of a comprehensive approach by the domestic authorities. By failing to properly evaluate the racist motives and the intimidating nature of the events, the state fell short of its

18 European Court of Human Rights, case of Király and Dömötör v. Hungary, application no. 10851/13, January 17, 2017.

19 European Court of Human Rights, case of Söderman v. Sweden, application no. 5786/08, November 12, 2013.

20 Söderman v. Sweden, para. 85.

21 Király and Dömötör v. Hungary, para. 61.

positive obligations. In this context, the Court effectively acknowledged that criminal-law measures may be required where individuals are subjected to direct or indirect verbal attacks and physical threats driven by discriminatory attitudes.[22]

The importance of criminal-law protection in the context of hate speech was further underlined in *Beizaras and Levickas v. Lithuania*. In that case, the Court reaffirmed a principle established in its earlier case law: where acts amounting to serious offences are directed against a person's physical or mental integrity, effective criminal-law mechanisms are necessary to ensure adequate protection and to serve as a deterrent. It emphasised that criminal-law measures are particularly warranted in situations involving direct verbal assaults or threats motivated by prejudice.[23] The Court considered that it would have been manifestly unreasonable for the victims, and would also have downplayed the seriousness of the impugned comments, to require the applicants to exhaust any other remedies such as civil ones.[24] Taken together, these cases illustrate the Court's evolving approach: while not all forms of harmful expression require criminal sanctions, such measures become essential where hate speech crosses the threshold into serious attacks on dignity, safety and psychological integrity.

At the same time, the Court has emphasised that criminal sanctions, particularly those targeting individuals responsible for the most serious forms of hate speech, such as expressions inciting violence, must be regarded as a measure of *ultima ratio*, to be used only when less restrictive responses are insufficient.[25] This approach is reflected in *Vona v. Hungary*,[26] where the Court took note of the Hungarian Government's argument that the dissolution of an association responsible for organising racist and anti-Semitic demonstrations constituted a proportionate response. The Government maintained that such a measure was not the most severe sanction available, especially in light of the principle that criminal-law penalties should be reserved for the gravest forms of racial hatred, particularly those involving incitement to violence.

By engaging with this argument, the Court implicitly reaffirmed a broader principle: although states have a duty to respond effectively to hate speech,

22 Király and Dömötör v. Hungary, paras. 76–78.

23 Beizaras and Levickas v. Lithuania, para. 111.

24 Beizaras and Levickas v. Lithuania, para. 128.

25 Beizaras and Levickas v. Lithuania, 111 para.

26 European Court of Human Rights, case of Vona v. Hungary, application no. 35943/10, December 9, 2013, para. 42.

the choice of legal measures must be applied cautiously and only where necessary. However, the Court has not developed this reasoning to its full extent. In particular, it has not clearly explained how to reconcile the *ultima ratio* nature of criminal liability with the requirement to provide effective remedies. Its case law instead suggests, without fully articulating a general test, that criminal law becomes indispensable in situations involving explicit calls for attacks on individuals' physical or psychological integrity, where less intrusive measures would be insufficient.

4. New Jurisprudential Contexts and the Need to Reassess Liability Regimes

The developing case law of the Court on hate speech and the corresponding positive obligations imposed on states raises increasingly complex challenges for Convention member states, particularly in light of three emerging jurisprudential trends.

First, as already noted, the Court's case law under Article 10 of the Convention has expanded the scope for the permissible criminalisation of unlawful speech. This development, in turn, raises important questions about the extent to which states may or even must restrict hate speech in order to comply with their positive obligations under Article 8 of the Convention.

Second, the rapid growth of online communication has significantly broadened the landscape of potential liability, extending it beyond the original authors of hate speech to include intermediaries and other actors. This evolution creates uncertainty regarding the precise scope of national obligations, particularly in relation to law enforcement and regulatory responsibilities.

Third, the Court's expanding recognition of harm, especially in situations where the impact on victims is indirect, collective or not immediately identifiable, introduces further ambiguity. This raises difficult questions about the threshold for initiating legal proceedings and the evidentiary basis required for authorities to act.

These developments collectively highlight the need for greater doctrinal clarity. Each of these issues are considered in turn.

4.1. Article 10 as a Vehicle for the Expansion of Hate Speech Restrictions

Hate speech in the case law of the Court has primarily developed under Article 8 of the Convention, typically in cases brought by individuals alleging that state authorities failed to respond adequately to harmful expression. However, an equally important line of jurisprudence has emerged under Article 10. Over time, this strand of case law has become central to defining the boundaries of hate speech, as it concerns situations in which national authorities restrict expression and the Court is called upon to assess the lawfulness and proportionality of such interference. In this way, Article 10 case law serves as a key lens through which the Court delineates what types of expression may legitimately be limited, thereby shaping the broader concept of hate speech.

The Court has examined numerous cases in which restrictions on expression were assessed for their proportionality. A particularly illustrative example is *Balsytė-Lideikienė v. Lithuania*.[27] In that case, the applicant, the owner of a publishing company, produced calendars presenting historical events from a perspective that promoted ethnic hostility toward Jews, Poles, and Russians. She was held administratively liable under the Code of Administrative Offences, the calendars were confiscated and, ultimately, no fine was imposed.

While the Court found a violation of Article 6, it concluded that there had been no violation of Article 10. Reiterating that particular caution is required where sanctions might deter the press from contributing to debate on matters of public interest, the Court nevertheless held that the interference pursued a legitimate aim and was proportionate. It considered the reasons provided by the domestic courts to be both relevant and sufficient and relevant, justifying the restriction (para 85).

Although the Court acknowledged that the confiscation of the calendars constituted a 'relatively serious' measure (para 84), it ultimately accepted the domestic authorities' response as appropriate in light of the openly discriminatory and hostile content. At the same time, the case highlights a broader doctrinal difficulty: where even relatively severe measures are upheld in situations involving explicit and direct expressions of ethnic hatred, the outer limits of permissible restrictions on unlawful (hate) speech remain somewhat indeterminate.

[27] European Court of Human Rights, case of Balsytė-Lideikienė v. Lithuania, application no. 72596/01, February 4, 2009.

With the judgment in *Féret v. Belgium*,[28] the Court entered a particularly complex area concerning liability for hate speech, highlighting the first set of problems arising from the evolution of its case law. In this case, the applicant, chairman of the 'Front National–Nationaal Front' political party and a member of the Belgian House of Representatives, was involved in the dissemination of leaflets and posters during an election campaign. These materials included slogans such as 'Stop the Islamisation of Belgium' and 'Save our people from the risk posed by Islam', which led to complaints of incitement to hatred, discrimination, and violence. Following a request by the prosecutor, the applicant's parliamentary immunity was lifted, and criminal proceedings were initiated against him in his capacity as author, editor-in-chief of the materials, and owner of the associated website. He was ultimately sentenced to 250 hours of community service related to the integration of immigrants, received a ten-month suspended prison sentence, and was banned from standing for election for ten years. The Court found no violation of Article 10.

The Court underlined that *incitement to hatred did not necessarily require the calling of a specific act of violence or another criminal act. Attacks on persons committed through insults, ridicule or defamation aimed at specific population groups or incitement to discrimination, as in this case, sufficed for the authorities to give priority to fighting hate speech when confronted by the irresponsible use of freedom of expression which undermined people's dignity, or even their safety*.[29]

The Court also departed from the traditional notion that political speech enjoys a particularly high level of protection. It held that, although political parties must benefit from broad freedom of expression in an electoral context in order to persuade voters, this protection is not unlimited. In particular, where speech is racist or xenophobic, the electoral context may actually exacerbate its harmful effects by amplifying and legitimising messages of hatred and intolerance. As the Court noted, such circumstances can make the impact of this type of discourse 'greater and more damaging' (para. 76).

The judgement is particularly notable for the Court's approach to the effects of the impugned speech. It held that the statements were *inevitably of such a nature as to arouse, particularly among the less informed members of the public, feelings of distrust, rejection or even hatred towards foreigners*.

---

28 European Court of Human Rights, case of Féret v. Belgium, application no. 15615/07, July 16, 2009.

29 Féret v. Belgium, para. 73.

This reasoning raises concerns due to its somewhat abstract and predictive assessment of harm, rather than reliance on concrete evidence of actual impact. This aspect of the judgment was explicitly criticised in the dissenting opinion of András Sajó, joined by Paolo Zagrebelsky and Nona Tsotsoria. The dissenting judges questioned the majority's reliance on speculative effects and warned against lowering the threshold for restricting political speech, particularly in the context of electoral debate.

The Court's approach appears to sit uneasily with its earlier emphasis on the heightened protection afforded to political speech and the correspondingly narrow margin of appreciation available to states. In *Mouvement Raëlien Suisse v. Switzerland*,[30] the Court reiterated that the breadth of a state's margin of appreciation in restricting expression depends on several factors, including the nature of the speech at issue. Crucially, it stressed that *there is little scope under Article 10(2) of the Convention for restrictions on political speech*, reflecting the fundamental importance of open political debate in a democratic society.

Against this background, the reasoning in *Féret v. Belgium* and subsequent cases signals a notable shift. In situations involving racist or xenophobic expression, even within the context of political campaigning, the Court has shown greater willingness to uphold restrictions. This apparent lowering of the threshold for limiting political speech has been described by Natalie Alkiviadou as a 'low-threshold hatred paradigm', capturing the idea that certain forms of harmful expression may justify intervention even where traditional protections for political or other types speech would otherwise apply.[31]

4.2. Online Speech – The Context of Liability for the Actions of Third Parties

The rise of online communication has significantly altered the way hate speech affects vulnerable groups, creating new challenges for the Court. Unlike traditional forms of expression, online speech is pervasive, rapidly disseminated and capable of reaching vast audiences almost instantaneously. As a result, its impact is more diffuse and can affect individuals and communities in a multitude of ways, often extending far beyond the original context in which the speech was produced.

30 European Court of Human Rights, case of Mouvement Raëlien Suisse v. Switzerland, application no. 16354/06, July 13, 2012.

31 Alkiviadou, *Hate Speech*.

This dynamic is further amplified by the design of major platforms such as Facebook, YouTube, and X, which rely on engagement-driven algorithms. Content that provokes strong emotional reactions, particularly anger, outrage or fear, is more likely to be promoted and widely shared.[32] In such an environment, harmful or hateful expression can be algorithmically amplified, increasing both its visibility and its potential to cause harm.

In this context, the Court has begun to address the specific challenges posed by online communication, particularly in relation to the effects of speech and the attribution of responsibility. This has led to a gradual shift away from traditional approaches, especially concerning how liability may be imposed, not only on the original speakers but also, in certain circumstances, on intermediaries or third parties.

Drawing on its earlier reasoning in *Delfi AS v. Estonia*,[33] the Court in *Sanchez v. France*[34] addressed the allocation of responsibility for hate speech in the context of social media. The Court observed that, by choosing to keep his Facebook page publicly accessible, the applicant had assumed a degree of responsibility for the comments posted by third parties on his page.

Importantly, the Court emphasised that the 'duties and responsibilities' inherent in Article apply with particular force to politicians using social media for political purposes. It stressed that the applicant could not be regarded merely as a private individual, but rather as a public figure engaged in political communication, which entails heightened responsibilities. In assessing the case, the Court also highlighted the specific risks associated with online hate speech, noting its capacity for rapid and wide dissemination. It suggested that imposing liability in such contexts may serve as a means of striking a fair balance between freedom of expression and the protection of private life under Article 8.[35]

Natalie Alkiviadou has pointed out that the Court's reasoning raises certain concerns. While it made strong and emphatic statements about the harmful impact of online hate speech, it did not support these assertions with empirical evidence or detailed analysis. Given the criminal nature of the sanctions

---

32 See, for example, CCDH's research with JFNA shows that Instagram and e-commerce platforms are amplifying and monetizing racism, antisemitism and "hate merch". "Hate for Sale," Center for Countering Digital Hate, published November 22, 2025, https://counterhate.com/research/hate-for-sale/.

33 European Court of Human Rights, case of Delfi AS v. Estonia, application no. 64569/09, June 16, 2015.

34 European Court of Human Rights, case of Sanchez v. France, application no. 45581/15, May 15, 2023.

35 Alkiviadou, *Hate Speech*.

imposed, the fundamental importance of freedom of expression, and the fact that the impugned comments were authored by third parties rather than the applicant himself, a more rigorous examination of the actual impact of online hate speech might have been expected.[36]

Considering the focus on criminal liability in the present analysis, the dissenting opinion of Judge Ravarani highlights several important concerns. Judge Ravarani strongly opposed the decision to hold the applicant liable for a comment posted by a third-party user, which had in fact been deleted by that user within approximately 24 hours. In his view, it was unreasonable to attribute responsibility to the applicant for failing to remove content that had already been promptly self-deleted, especially given the practical realities of monitoring online interactions.

Judge Ravarani further grounded his criticism in the principle of strict interpretation in criminal law, arguing that the majority's approach effectively broadened the scope of criminal liability beyond acceptable limits. In particularly forceful terms, he described the judgement as *an unacceptable extension of a criminal incrimination by an international court which constantly repeats that it is not a court of fourth instance*. (para 5 of the dissenting opinion) The dissent thus raises broader concerns about legal certainty and foreseeability, especially in the context of imposing criminal liability for online speech authored by third parties.

Judge Kūris in his concurring opinion expressed his doubts, including his dissatisfaction with established case-law in earlier hate speech cases. He underlined that the analysed national regulatory framework is *cascading criminal liability* (para 3 of the concurring opinion).

4.3. Article 8 and the Ambiguous Notion of the 'Victim'

A third and equally significant development in the case law of the Court concerns the increasingly ambiguous understanding of who qualifies as a 'victim' in hate speech cases. Traditionally, the legal framework presupposed a relatively clear relationship between a perpetrator and an identifiable victim. However, as already noted in the context of digital communication, the notion of the perpetrator has become more diffuse. A similar shift can now be observed with regard to the concept of the victim, whose boundaries are becoming less clearly defined.

36 Alkiviadou, *Hate Speech*.

The judgment in *Minasyan and Others v. Armenia* illustrates this development. In that case, the Court extended the scope of positive obligations under Article 8 to individuals who did not themselves possess the characteristics targeted by the discriminatory speech, but who were associated with or worked in support of a vulnerable group. The applicant's human rights defenders were not members of the LGBT community, which was the primary target of the impugned publications, yet they were affected through their professional and perceived association with that group.

This reasoning implies that the Convention may restrict defamatory or harmful expression not only when it directly targets individuals or groups, but also when it operates through association with a protected community. While this marks an important step in the evolution of the Court's jurisprudence, recognising the broader and indirect effects of stigma and stereotyping, it also introduces complexity for national legal systems tasked with implementing these standards.

On the one hand, by acknowledging the harmful impact of stereotyping and hate speech on vulnerable groups, the Court has opened the door for states to adopt more proactive measures to combat such expression. On the other hand, this expansion raises concerns about the limits of state responsibility and the potential encroachment on freedom of expression under Article 10.

As Natalie Alkiviadou underlines, the broader and more flexible notion of 'victim' may grant states considerable discretion in defining what constitutes harmful expression. This creates a risk that hate speech regulation could be used to suppress dissenting or unpopular views under the pretext of protecting vulnerable groups. The imposition of positive obligations in this area may enable governments to shape the narrative around what qualifies as harm, thereby embedding state-endorsed perspectives within the regulation of speech.[37]

5. Expanding the Limits of Positive Obligations: The National 'Scissors' of Liability Regimes

The approach of the Court reflects certain tensions. On the one hand, the Court has been reluctant to prescribe a strict and uniform criminal liability regime under Article 8 of the Convention. On the other hand, through its case law, it increasingly suggests that criminal-law responses may be necessary in serious hate speech situations. This dual movement creates practical difficulties for

37 Alkiviadou, *Hate Speech*.

national authorities, which must navigate between flexibility and the risk of under-enforcement.

In *Atamanchuk v. Russia*, the Court reiterated that it is *particularly sensitive towards sweeping statements attacking or casting in a negative light entire ethnic, religious or other groups*.[38] Such statements, especially when combined with the evolving contexts of online communication and indirect harm, reinforce the Court's heightened concern with group-based hostility. However, this growing sensitivity is not accompanied by a clearly structured framework for determining when and how authorities should act, leaving domestic institutions with considerable uncertainty.

This uncertainty becomes even more evident when examining specific forms of expression, such as humour. In its case law, the Court employs a highly contextual and multi-layered assessment, taking into account factors such as intent, audience, medium, potential impact and other factors.[39] While this nuanced approach allows for flexibility, it also complicates predictability and consistency in application.

Even in areas where the Court has developed relatively stable standards such as speech related to national security scholars have pointed to similar concerns. Theo Tsomidis observes that *the intricate nature of the balancing exercise distorts the consistency and predictability of the outcome of the Court's deliberation regarding the protection of speech*.[40] He further argues that *a better demarcated, more principled and less fact-specific determination of what amounts to advocacy of violence would contribute to legal certainty and actually enhance the protection of free speech*.[41]

Under Article 1 of the Convention, national authorities bear primary responsibility for implementing Convention standards, reinforced by the principle of subsidiarity embedded in the Convention system. However, the increasingly flexible and context-dependent notion of hate speech developed by the Court makes it difficult to identify clear boundaries for lawful expression. In practice, this may encourage national authorities to err on the side of restriction, rather than undertake the more demanding task of justifying non-intervention.

---

38 European Court of Human Rights, case of Atamanchuk v. Russia, application no. 4493/11, November 12, 2020.

39 Alessandro Godioli et al., *What's in a Joke? Assessing Humor in Free Speech Jurisprudence* (Forum for Humor and the Law and Columbia Global Freedom of Expression, 2025), 34–39, https://doi.org/10.5281/zenodo.15383543.

40 Tsomidis, "Freedom of Expression," 392.

41 Tsomidis, "Freedom of Expression," 392.

As a result, the Court's evolving approach risks expanding the discretionary space available to states when regulating hate speech. While discretion is not inherently problematic, it becomes concerning in the absence of clear safeguards against error, arbitrariness, or the embedding of state-preferred narratives within hate speech regulation. Where domestic legal frameworks are vague or underdeveloped, this discretion may translate into inconsistent or overly restrictive practices.

One notable consequence is the risk of overcriminalisation. Where the Court finds no violation of Article 10 of the Convention in cases involving criminal sanctions, national authorities may perceive criminal prosecution as a 'safe' regulatory choice. In some instances, domestic authorities have even initiated or intensified investigations in response to proceedings before the Court,[42] suggesting that procedural compliance with Convention standards may take precedence over substantive proportionality.

Yet criminal law should not become the default response. As widely acknowledged in freedom of expression doctrine, recourse to criminal sanctions must remain exceptional and reserved for the most serious forms of harmful expression.[43] This raises the question of 'dangerousness' as a guiding criterion. In an environment where public discourse is increasingly polarised, especially online, assessing the harm imposed by particular expressions becomes extremely difficult. The sheer scale of online communication further challenges the effectiveness of criminal-law responses, which may be ill-suited to address rapidly evolving digital harms.

The effectiveness of enforcement must also be considered. While there is a strong emphasis on holding perpetrators of hate speech accountable, less attention is often paid to the efficiency and timeliness of proceedings. Criminal processes are typically lengthy, which is particularly problematic in the context of online speech, where harmful content can spread instantaneously and cause immediate damage. Delayed responses may therefore undermine the very protective function that positive obligations under Article 8 are intended to serve.

42 See, for example, European Court of Human Rights, case of Svirplys and Latvys v. Lithuania, application no. 41390/15, February 27, 2023.

43 ARTICLE 19, *Responding to 'Hate Speech': Comparative Overview of Six EU Countries* (2018), 11.

6. The Need to Develop a State-Specific and Foreseeable Legal Framework for Hate Speech

The case law of the Court increasingly calls for a coherent and structured response at the national level. It is not sufficient for domestic authorities merely to follow the criteria developed by the Court in identifying what constitutes hate speech. Rather, national systems must, first, treat the Court's jurisprudence as establishing minimum standards and, second, build upon this foundation by developing clear, precise and context-sensitive legal frameworks tailored to their own societies.

While the Court has made it clear that criminal-law measures are particularly warranted in cases involving *direct verbal assaults or threats motivated by prejudice*,[44] a significant margin of discretion remains for states in addressing other forms of harmful expression. As a general rule, domestic law must ensure the availability of effective remedies for victims of hate speech. This objective may be better achieved through differentiated legal frameworks that distinguish between the most serious forms of harmful expression, requiring criminal sanctions, and less severe forms, which may be addressed through administrative or civil mechanisms reflecting a lower threshold of 'dangerousness'.

Such differentiation already exists in certain contexts, for example in the regulation of hate speech in media by administrative bodies. However, broader areas of public discourse, particularly online communication, require more refined and specific regulatory approaches. This implies the importance of nuanced, country-specific legislation that not only incorporates general legal criteria but also reflects the particular social, historical, and cultural context. Ideally, such frameworks should emerge from transparent legislative processes involving public debate, thereby enhancing their legitimacy and practical applicability.

One potential avenue for clarifying the boundary between lawful expression and criminal hate speech lies in the development of administrative liability regimes. In many jurisdictions, certain forms of incitement to hatred, while clearly harmful and contrary to principles of equality, do not meet the high threshold required for criminal sanctions and therefore remain unaddressed. There might be different reasons of acquittals in hate speech criminal cases, including ambiguity of meaning, failure to establish intent, insufficient demonstration of harm, reclassification of conduct as insult or defamation, private setting of

44 Beizaras and Levickas v. Lithuania, para. 111.

speech, lack of provocation and difficulties in proving that statements were directed at a protected group or capable of disturbing public peace.[45]

Given that the harm caused by hate speech is often diffuse and difficult to quantify, it is frequently underestimated in legal practice. Administrative sanctions could fill this gap by providing a more flexible and responsive tool for addressing harmful expression that falls short of criminality but nevertheless warrants intervention.[46]

At the same time, there is a need for more precise and clearly defined criteria for distinguishing hate speech that justifies criminal liability. Criminal law should rely on narrowly tailored elements, such as intent, severity of harm, and directness of incitement, rather than broad and flexible criteria derived from Strasbourg jurisprudence, which are designed for case-by-case balancing rather than strict legal classification.

It is also important to recognise that incitement to hatred, like hate crimes more broadly, is highly latent. Many incidents go unreported due to victims' fear, reluctance, or lack of awareness, as well as uncertainty about available remedies.[47] This further underlines the need for accessible and effective legal mechanisms that encourage reporting and ensure meaningful redress.

Although some cases clearly require a strong criminal-law response, the Court's evolving jurisprudence demonstrates an awareness of broader contexts and indirect forms of harm. Importantly, while the Court has expanded states' positive obligations, it has not imposed a blanket requirement to criminalise all forms of hate speech, reserving criminal liability for the most serious cases.

Some scholars would argue that *sanctioning hate speech with criminal prosecution, accompanied by strict judicial review, would be a better course of action*, considering that, however, *merely symbolic criminalisation <...> is not sufficient if the legal provisions are not implemented or the acts in question are not adequately prosecuted*.[48] On the other hand, the tendency to broaden the use of

---

45 Vladimir Komarnickiy, Daniel Gotthardt and Maksim Pleshkov, "Incitement to Hatred: Comparative Analysis of Legislative Consolidation and Practical Application," *Baltic Journal of Law & Politics* 18, no. 2 (2025): 133, https://doi.org/10.2478/bjlp-2025–0017.

46 Aurelijus Gutauskas and Žaneta Navickienė, *Neapykantos nusikaltimai ir neapykantos kalba: kur prasideda ir kur baigiasi saviraiškos laisvės ribos?* (Mykolas Romeris University, 2022), 88, https://repository.mruni.eu/handle/007/18491.

47 Monika Guliakaitė-Danisevičienė, *Neapykantos kalba Lietuvoje* (Lithuanian Human Rights Centre, 2023), 22.

48 Julia Kapelańska-Pręgowska and Maja Pucelj, "Freedom of Expression and Hate Speech: Human Rights Standards and Their Application in Poland and Slovenia," *Laws* 12, no. 4 (2023): 19–20, https://doi.org/10.3390/laws12040064.

exemption from criminal liability that might be supported by practitioners and legal scholars[49] may go in opposite direction from the need to ensure effective remedy regarding hate speech if there is no functional alternative liability regime besides criminal. In this regard the more flexible hate speech legal framework would arguably allow for more effective investigations, leaving 'dangerous' cases only for complicated criminal investigations, allowing less complex procedures such as administrative or even civil for less harmful content analysis.

Addressing the risk of criminalisation of hate speech requirement under the Convention, it is important to underline that the concept of 'criminal' under the Convention may itself allow for a degree of flexibility. Certain administrative sanctions, particularly those of a punitive and deterrent nature, may fall within the Convention's autonomous understanding of criminal liability.[50] This opens the possibility of developing hybrid systems that combine criminal, administrative and civil remedies.

A well-designed, systemic approach could therefore distinguish between: (i) Criminal liability, reserved for the most serious cases involving clear intent and significant harm; (ii) Administrative liability, addressing less severe but still harmful expressions through proportionate sanctions; (iii) Civil remedies, including specialised mechanisms for hate speech that allow for more nuanced responses, such as simplified procedures or adjusted burdens of proof.

Such differentiation would enhance both effectiveness and legal certainty. By contrast, a binary system, criminal liability or no liability at all, creates significant practical difficulties. It generates uncertainty for law enforcement authorities, places excessive burdens on criminal justice systems (especially in contexts of widespread hate speech), and leaves many harmful instances unaddressed due to their latency and difficult burden of proof.

7. Conclusions

The member states of the European Convention must address hate speech in a manner consistent with the case law of the European Court of Human Rights. However, the Court's evolving jurisprudence on hate speech makes this task

49 See, for example, Gintaras Švedas et al., *Lietuvos Respublikos baudžiamojo kodekso bendrosios dalies vientisumo ir naujovių (su)derinimo iššūkiai* (Vilniaus universiteto leidykla, 2017), 164–165.

50 See already mentioned Balsytė-Lideikienė v. Lithuania.

complex, placing an excessive and often discretionary burden on domestic authorities if they rely solely on Strasbourg's guidance.

The principle of subsidiarity of the Convention system reinforces the need for clearer national legal frameworks, incorporating a diversified system of criminal, administrative and civil remedies capable of addressing hate speech according to varying levels of 'dangerousness' and directness of a threat.

The Court's case-law that relies exclusively on criminal liability in a fight against hate speech risks leaving more latent forms of hate speech insufficiently investigated, while also imposing an undue burden on domestic law enforcement in tackling widespread, particularly online, manifestations of hate speech. It may encourage a preference for criminalisation in borderline cases, driven by discretionary interpretations of the Court, which increasingly promotes proactive and preventive actions by national authorities.

References

Specialised literature

Alkiviadou, Natalie. *Hate Speech and the European Court of Human Rights*. Routledge, 2025. https://doi.org/10.4324/9781003560548.

Alkiviadou, Natalie. "Hate Speech, Positive Obligations and Free Speech: ECtHR's Expanding Framework in Minasyan and Others v. Armenia." *Strasbourg Observers*, March 7, 2025. https://strasbourgobservers.com/2025/03/07/hate-speech-positive-obligations-and-free-speech-the-ecthrs-expanding-framework-in-minasyan-and-others-v-armenia-2025/.

ARTICLE 19. *Responding to 'Hate Speech': Comparative Overview of Six EU Countries*. 2018.

Belavusau, Uladzislau. "Hate Speech and Constitutional Democracy in Eastern Europe: Transitional and Militant? (Czech Republic, Hungary and Poland)." *Israel Law Review* 47, no. 1 (2014): 27–61. https://doi.org/10.1017/S0021223713000241.

Center for Countering Digital Hate. "Hate for Sale." Published November 22, 2025. https://counterhate.com/research/hate-for-sale/.

Godioli, Alessandro, Sabine Jacques, Jennifer Young, and Ariadna Matamoros Fernandez. *What's in a Joke? Assessing Humor in Free Speech Jurisprudence*. Forum for Humor and the Law and Columbia Global Freedom of Expression, 2025. https://doi.org/10.5281/zenodo.15383543.

Guliakaitė-Danisevičienė, Monika. *Neapykantos kalba Lietuvoje*. Lithuanian Human Rights Centre, 2023.

Gutauskas, Aurelijus, and Žaneta Navickienė. *Neapykantos nusikaltimai ir neapykantos kalba: kur prasideda ir kur baigiasi saviraiškos laisvės ribos?*. Mykolas Romeris University, 2022. https://repository.mruni.eu/handle/007/18491.

Husak, Douglas. "Alternative Theories of Criminalization." In *Overcriminalization: The Limits of the Criminal Law*. Oxford University Press, 2007. https://doi.org/10.1093/acprof:oso/9780195328714.003.0004.

Kapelańska-Pręgowska, Julia, and Maja Pucelj. "Freedom of Expression and Hate Speech: Human Rights Standards and Their Application in Poland and Slovenia." *Laws* 12, no. 4 (2023). https://doi.org/10.3390/laws12040064.

Komarnickiy, Vladimir, Daniel Gotthardt, and Maksim Pleshkov. "Incitement to Hatred: Comparative Analysis of Legislative Consolidation and Practical Application." *Baltic Journal of Law & Politics* 18, no. 2 (2025): 117–139. https://doi.org/10.2478/bjlp-2025–0017.

Mchangama, Jacob, and Natalie Alkiviadou. "Hate Speech and the European Court of Human Rights: Whatever Happened to the Right to Offend, Shock or Disturb?" *Human Rights Law Review* 21, no. 4 (2021): 1008–1042. https://doi.org/10.1093/hrlr/ngab015.

Švedas, Gintaras, Paulius Veršekys, Justyna Levon, and Darius Prapiestis. *Lietuvos Respublikos baudžiamojo kodekso bendrosios dalies vientisumo ir naujovių (su) derinimo iššūkiai*. Vilniaus universiteto leidykla, 2017.

Tsomidis, Theo. "Freedom of Expression in Turbulent Times – Comparative Approaches to Dangerous Speech: The ECtHR and the US Supreme Court." *International Journal of Human Rights* 26, no. 3 (2022): 379–399. https://doi.org/10.1080/13642987.2021.1928084.

Court practices

European Court of Human Rights. Case of Aksu v. Turkey. Applications nos. 4149/04 and 41029/04. March 15, 2012.

European Court of Human Rights. Case of Atamanchuk v. Russia. Application no. 4493/11. November 12, 2020.

European Court of Human Rights. Case of Balsytė-Lideikienė v. Lithuania. Application no. 72596/01. February 4, 2009.

European Court of Human Rights. Case of Behar and Gutman v. Bulgaria. Application no. 29335/13. May 16, 2021.

European Court of Human Rights. Case of Beizaras and Levickas v. Lithuania. Application no. 41288/15. January 14, 2020.

European Court of Human Rights. Case of Budinova and Chaprazov v. Bulgaria. Application no. 12567/13. May 16, 2021.
European Court of Human Rights. Case of Delfi AS v. Estonia. Application no. 64569/09. June 16, 2015.
European Court of Human Rights. Case of Féret v. Belgium. Application no. 15615/07. July 16, 2009.
European Court of Human Rights. Case of Király and Dömötör v. Hungary. Application no. 10851/13. January 17, 2017.
European Court of Human Rights. Case of Lilliendahl v. Iceland. Application no. 29297/18. June 22, 2018.
European Court of Human Rights. Case of Minasyan and Others v. Armenia. Application no. 59180/15. March 7, 2025.
European Court of Human Rights. Case of Mouvement Raëlien Suisse v. Switzerland. Application no. 16354/06. July 13, 2012.
European Court of Human Rights. Case of Sanchez v. France. Application no. 45581/15. May 15, 2023.
European Court of Human Rights. Case of Söderman v. Sweden. Application no. 5786/08. November 12, 2013.
European Court of Human Rights. Case of Svirplys and Latvys v. Lithuania. Application no. 41390/15. February 27, 2023.
European Court of Human Rights. Case of Vona v. Hungary. Application no. 35943/10. December 9, 2013.
European Court of Human Rights. Case of Z.B. v. France. Application no. 46883/15. September 2, 2021.

Abstract

Criminal, Administrative or Civil Remedies? Positive Obligations and the Limits of State Response to Hate Speech Under the ECHR

To what extent does the European Convention on Human Rights (ECHR) require states to impose criminal liability for hate speech? This article addresses this foundational question by critically analysing the normative justifications for a strict criminal law response to hate-motivated acts. It assesses whether alternative liability regimes, such as civil or administrative sanctions, could fulfil the state's duty to protect individuals from discrimination and violence while avoiding the risks of over-criminalisation.

Relying on recent jurisprudence of the European Court of Human Rights, the article examines the evolving threshold for criminal intervention in hate speech cases. It highlights the potential legal and societal consequences of expanding criminal liability. It considers whether states can and should adopt a differentiated system of liability that calibrates the legal response to the gravity and context of hate-motivated expression, particularly with regard to the distinction between physical and online acts.

Keywords: hate speech, liability, overcriminalisation, ECHR, freedom of speech, positive obligations

Santrauka

Baudžiamoji, administracinė ar civilinė atsakomybė? Pozityviosios valstybių narių pareigos dėl atsako į neapykantos kalbą pagal EŽTK

Kokiu mastu Žmogaus teisių ir pagrindinių laisvių apsaugos konvencija įpareigoja valstybes taikyti baudžiamąją atsakomybę už neapykantos kalbą? Šiame straipsnyje kritiškai analizuojami normatyviniai pagrindai, kuriais grindžiamas griežto baudžiamojo atsako į neapykanta motyvuotus veiksmus poreikis. Vertinama, ar alternatyvios atsakomybės formos – tokios kaip civilinė ar administracinė atsakomybė – galėtų užtikrinti valstybės įsipareigojimus pagal Žmogaus teisių ir pagrindinių laisvių apsaugos konvenciją apsaugoti asmenis nuo diskriminacijos ir smurto, kartu išvengiant perteklinio kriminalizavimo rizikos.

Remiantis naujausia Europos Žmogaus Teisių Teismo jurisprudencija, straipsnyje analizuojama kintanti baudžiamosios intervencijos riba neapykantos kalbos bylose. Svarstoma, ar valstybės gali – ir turėtų – taikyti diferencijuotą atsakomybės sistemą, kuri leistų pritaikyti teisinį atsaką pagal neapykantos išraiškos sunkumą ir kontekstą, ypač atsižvelgiant į skirtumą tarp fizinių ir virtualioje erdvėje įvykdytų veiksmų.

Pagrindiniai žodžiai: neapykantos kalba, atsakomybė, pernelyg griežtas baudžiamasis persekiojimas, EŽTT, žodžio laisvė, įpareigojimai

The Intersections of Criminal, Administrative and Civil Law:
International and National Contexts, pp. 201–219
https://doi.org/10.12797/9788383685328.09

Giedrė Lastauskienė
Vilnius University, Faculty of Law
giedre.lastauskiene@tf.vu.lt

The Case Law of the Constitutional Court of the Republic of Lithuania as a Source of Authority: A Case Study

1. Introduction

Following the restoration of Lithuania's independence in 1990, the Lithuanian legal system underwent a fundamental transformation, transitioning from the Soviet version of ideologised legal positivism to a rule-of-law-based system. In 1992, the Constitution of the Republic of Lithuania established the Constitutional Court for the first time in the country's history. Under Article 102 of the Constitution, the Constitutional Court determines whether laws and other acts of the Seimas are in conformity with the Constitution, and whether acts of the President of the Republic and the Government are in conformity with the Constitution or laws. In 1993, the Seimas of the Republic of Lithuania appointed all the judges of the Constitutional Court, and the Constitutional Court commenced its activities. This court not only exercised a constitutional review of legislative acts but also shaped official constitutional doctrine, which significantly influenced the development of legal scholarship and legal practice.

The case law of the Constitutional Court is widely studied in Lithuanian legal scholarship, but most research is limited to describing its content or analysing individual doctrinal elements. There is still a lack of systematic studies revealing the extent to which this case law has influenced the newly established Lithuanian legal system, which has integrated the doctrinal provisions developed by the Constitutional Court. Furthermore, there is insufficient analysis of the interaction between the Constitutional Court's case law and Lithuanian legal scholarship, and its influence on models of legal interpretation and application.

This article argues that the Constitutional Court's case law not only interprets the Constitution but also serves as an authoritative normative source, influencing the legal system through legal scholarship and the practice of applying the law.

The article examines two groups of cases in the Constitutional Court's case law: rulings on the binding nature of judicial precedent and cases relating to the development of the constitutional principle of the rule of law. The article employs doctrinal and historical analysis of the Constitutional Court's jurisprudence and examines its interaction with Lithuanian legal scholarship and legal practice.

2. Precedent – from the Doctrine of the Constitutional Court to the Legal System?

In legal literature discussing the Constitutional Court of the Republic of Lithuania's (hereinafter – the Constitutional Court) activity from 1999 to 2008, attention is drawn to the Constitutional Court's case law on judicial precedent. In this regard, two rulings of this court are often highlighted – those of 28 March 2006 and 24 October 2007 (hereinafter, the 2006 and 2007 rulings, respectively). The 2006 ruling was adopted, *inter alia*, in determining whether Article 69(4) of the Constitutional Court Act, under which the repeal of the contested legal act constitutes grounds for the Constitutional Court to decide to terminate the proceedings, is consistent with the Constitution; in the case, the applicant argued that this provision prevents the court from administering justice without applying a law that is contrary to the Constitution.[1] The 2007 ruling was adopted in a case initiated by a court of general jurisdiction. It challenged a provision under which courts are not obliged to take into account the entire case law of the courts of general jurisdiction, but must only comply with decisions of the Court of Cassation. The applicant argued that such a regulation was contrary to the interpretation of the Constitution set out in the Constitutional Court's 2006 ruling. At first glance, these are not related cases, but they were linked by the doctrine of the continuity of judicial practice (the binding nature of precedent) formulated by the Constitutional Court. In these rulings, the Constitutional Court established a normative (legally binding) model of precedent that has not yet been implemented in legal practice.

1 In this case, the Constitutional Court examined whether Article 69(4) of the Law on the Constitutional Court, providing that the repeal of a contested legal act constitutes grounds for terminating proceedings, was compatible with the Constitution. The applicant argued that this provision prevented courts from refusing to apply unconstitutional legislation.

2.1. The Doctrinal Context of the Continuity of Judicial Practice (the Binding Nature of Precedent)

In Lithuanian legal scholarship in 2006–2007, a moderate view prevailed regarding the place of precedent in the legal system. It was recognised that the same principle of case resolution operates throughout the Western legal tradition: 'Treat similar cases similarly, and different cases differently'. However, legal theory was dominated by the view that the role of precedent differs between the common law and civil law traditions. In the common law tradition, precedent is legally binding and a primary source of law, whereas in civil law, judges decide cases primarily in accordance with statutes. This principle is explicitly enshrined in Article 109(3) of the Constitution of the Republic of Lithuania, which states that judges, when adjudicating cases, are bound only by the law. In the continental legal tradition, the influence of previously adopted court decisions (particularly those of higher or supreme courts) on courts hearing similar cases was recognised, but this was usually linked not to a judge's legal duty to repeat a decision previously made by a court in a similar case, but to the authority of higher courts and other significant reasons encouraging the judge to follow an existing precedent for resolving a similar case.[2] In Lithuania, which belongs to the civil law tradition, neither legal regulation nor legal scholarship imposed a legal obligation on the court to repeat a previously adopted court decision in a similar case, even if such a precedent had been set by a higher court. Judges had the right to decide the case at their discretion (in accordance with the law and their own inner convictions) if, in their view, doing so would ensure that justice was done.

2.2. The Essence of the Constitutional Court's Rulings of 2006 and 2007

The Constitutional Court's 2006 ruling sets out a different concept of precedent.[3] In its ruling, the Court stated that: a) courts are bound by their own decisions in similar cases; b) lower courts are bound by the decisions of higher

2 The repetition of a higher court's judgement could be based on efforts to advance a judge's career, pragmatic motives (a desire to save time), or psychological reasons (repeating a higher court's judgment reduces internal tension and moral responsibility, etc.).

3 The Constitutional Court provided a description of the precedents of courts of general jurisdiction, but the distinctive features identified could in essence also be attributed to the decisions of administrative courts.

courts in cases of that category; c) higher courts, when reviewing the decisions of lower courts, must always assess them in accordance with the same legal criteria, and those criteria must be clear and known in advance to legal subjects, *inter alia* lower courts (judicial precedent must be predictable); d) new judicial precedents may be established only where this is unavoidable and objectively necessary, and such a correction of judicial practice must be duly (clearly and rationally) reasoned in the relevant court decisions. It follows from the text of the Constitutional Court's ruling that the Lithuanian legal system contains mandatory provisions that recognise both horizontal (between courts of the same instance) and vertical (between higher and lower courts) precedent as sources of law.

Thus, in formulating the characteristics of precedent, the Constitutional Court essentially adopted the elements of precedent customary in the common law tradition into continental law.

The Constitutional Court adopted the 2007 ruling after examining a request from the applicant – the court hearing the case – to examine a provision of the Code of Civil Procedure under which courts are bound only by published decisions of the Court of Cassation, and not by all precedents established by the courts. The court's referral stated that such a provision contradicted the Constitutional Court's 2006 ruling on the continuity of judicial precedent (the binding nature of precedent). In its 2007 ruling on this referral, the Constitutional Court not only reiterated the provisions of the 2006 ruling, which had conferred a normative (binding) character on precedent, but also held that precedent had a normative (binding) character. It also established new provisions which characterised judicial precedent differently (less categorically). It was further stated that precedents are based on *auctoritate rationis* (a reference to the power of authority) and that judicial precedents cannot be ignored without justification (it can be understood that the obligation to repeat a previous decision is not absolute). It was also stated that judicial precedents should only be relied upon when the precedent does not conflict with official constitutional doctrine and that, when determining the binding nature of a precedent, it is necessary to take into account a number of factors: a) the time at which the precedent was established, b) whether the precedent reflects established judicial practice or is an isolated case, c) the persuasiveness of the reasoning in the decision, d) the composition of the court that delivered the decision (whether the decision in question was delivered by a single judge, a panel of judges, or all the judges of the court), e) whether dissenting opinions were expressed by judges regarding the previous court decision, etc. On the one hand, the characteristics of a precedent set out in the 2007 ruling

brought its concept closer to the definition prevailing in continental law. Precedent is understood here as an authoritative decision of a higher court, and its application is linked to certain conditions under which previous decisions must be followed. On the other hand, the 2007 ruling also reiterated the provisions of the 2006 ruling, based on the concept of precedent characteristic of the common law tradition, according to which precedent is accorded a normative character. Thus, two different concepts of precedent were intertwined in a single ruling – the moderate concept characteristic of civil law and the normative concept closer to the common law tradition.

2.3. The 2006 and 2007 Rulings and the Legal Reality

The 2006 and 2007 rulings of the Constitutional Court created an ideal of the legal system (a certain model). Such ideal constructs are usually formed in legal scholarship, rather than in judicial practice. The provisions of both rulings regarding precedent were incorporated into academic literature (a constitutional law textbook) as part of the subject of constitutional law (the provisions of both rulings were incorporated into academic literature (a constitutional law textbook) as constitutional law principles governing the understanding and application of precedent),[4] thereby creating the conditions for them to be assessed and criticised within the framework of scholarly debate. However, due to the position formulated by the Constitutional Court and accepted by the legal community that the entire text of a ruling is binding, not just its operative part,[5] these provisions were given legal force. This means that statements of an academic nature have become binding on participants in legal proceedings and on courts when justifying their decisions. Nevertheless, despite the formulated doctrine, the precedent model has not taken root in practice. Following the adoption of these rulings, both theoretical and practical questions arose (and continue to do so to this day). Does precedent in Lithuania truly have a normative character? How does the binding nature of precedent reconcile with the constitutional provision that judges must decide cases in accordance with the law and their inner conviction? Is it possible to ensure the binding nature of horizontal precedent within the continental legal tradition? Is a Lithuanian lawyer capable

4 Eglė Bilevičiūtė et al., Lietuvos konstitucinė teisė, (State Enterprise Centre of Registers, 2017).

5 Vytautas Sinkevičius, " Konstitucijos interpretavimo principai ir ribos," *Jurisprudencija* 67, no. 59 (2005): 7–19.

of identifying analogous cases (given that the Lithuanian legal education system does not teach this)? These and other questions indicate that there is still no consensus on the model of how precedent operates in Lithuanian law. This is also confirmed by current legal practice.

In 2025, following the highly publicised acquittal by the Supreme Court of Lithuania in a criminal case involving abuse of power, intense discussions arose within the legal community regarding the place of precedent in the Lithuanian legal system. In the view of prosecutors, judicial practice in these cases is inconsistent and difficult to predict.[6] These reactions from legal professionals illustrate that, despite the Constitutional Court's model, even vertical precedent is often not followed in practice.

2.4. Why Does the Precedent Model Formulated by the Constitutional Court not Work in Practice?

As noted, the provisions on the binding nature of precedent formulated by the Constitutional Court in 2006 and 2007 are not being followed in practice. There may be several reasons for this. Firstly, the concept of precedent was 'imported' from the common law tradition. Although the Constitutional Court's provisions were incorporated into academic publications, they did not become established as the dominant view in legal scholarship. The incompatibility of these provisions with the conventional understanding of precedent in civil law may be one reason they have not taken root in legal practice. Secondly, the internal inconsistency of the Constitutional Court's doctrine may have played a significant role. The model of continuity in judicial practice formulated in the 2006 ruling essentially corresponds to the common law tradition. Meanwhile, in the 2007 ruling, this model was reiterated and, at the same time, supplemented

6 Prosecutors commented on the situation following the unexpected acquittal as follows: *Court practice in abuse of office cases and, more generally, regarding crimes against the civil service, is remarkably similar to riding an American rollercoaster – you never know what will happen*; *We have three decisions by panels of the Supreme Court of Lithuania which differ in similar situations, yet we are required to apply them. A body of case law has been established by panels of seven judges and plenary sessions, but for some reason, after a certain period, a panel of three judges changes that practice. We don't know how to proceed. There is no clarity*. Ingrida Steniulienė, "Prokuratūra: po LAT sprendimo Sinkevičiaus byloje daugelis jaučiasi nejaukiai," *LTR*, March 23, 2025, https://www.lrt.lt/naujienos/lietuvoje/2/2518892/prokuratura-po-lat-sprendimo-sinkeviciaus-byloje-daugelis-jauciasi-nejaukiai?srsltid=AfmBOordl1MU3exQuEcg_dS9tvFdNtll8_b_IFKVkLOG6cyZIaTEoPZS.

with more moderate criteria closer to the continental legal tradition. In this way, a contradictory and ambiguous concept of precedent was created. Thirdly, the normative nature of the provisions of these rulings is unclear. The Constitutional Court's rulings formulate a certain legal ideal (vision), but the question arises as to how this is compatible with the position that all provisions of the ruling are legally binding. On the other hand, if these provisions are considered binding on all participants in the legal system, doubts arise about their compatibility with the rule explicitly enshrined in the Constitution that judges shall adjudicate cases in accordance with the law.

Taken together, these reasons explain why the precedent model formulated by the Constitutional Court has remained more of a theoretical construct than a functioning instrument of legal practice.

3. The Constitutional Court and the Significance of Legal Principles in the Lithuanian Legal System – Is There a Connection?

Following the restoration of Lithuania's independence, the Lithuanian legal system underwent a fundamental transformation, rejecting the Soviet tradition of ideologised legal positivism. One of the most striking aspects of this transformation was the paradigm shift in the conception of legal principles – from viewing them as ideological and non-binding provisions to recognising them as independent and legally significant elements of the legal system. In this context, the Constitutional Court played a special role in the development of the Lithuanian legal system, with its case law contributing significantly to transforming the concept of legal principles and the model of their operation.

3.1. Legal Principles in Lithuanian Legal Scholarship: Soviet Origins and Genesis

The law of restored Lithuania replaced the law of Soviet Lithuania, which had been created according to a single model throughout the Soviet Union and was ideologically determined. In Soviet law, principles lacked independent normative force and were not directly applied in the adjudication of cases. In Soviet legal scholarship, legal principles were understood as (or something similar to): *guiding principles expressed in law, characterising its content*, which are *determined by the objective laws of the development of Soviet society*.

Their content is constantly being supplemented. Thus, the principles develop alongside the Soviet state and its law. It was argued, for example, that criminal law does not seek any legal principles specific to it, and that, in this branch of law, general legal principles simply acquire specific features. Soviet academic literature identified the following principles of criminal law: socialist legality, socialist democracy, Soviet patriotism and socialist internationalism, socialist humanism, and the principle of personal responsibility of the guilty party.[7] Thus, in Soviet Lithuanian legal scholarship, principles were understood as guiding provisions (operating at the level of human consciousness) that did not directly regulate the conduct of legal subjects and were not applicable to the resolution of specific legal disputes. Of the list of declared principles presented, only the principles of legality and personal responsibility are of a nature typical of law.

Following the restoration of independence, new ideas characteristic of the Western legal tradition found it difficult to gain a foothold in Lithuanian legal scholarship, which for some time remained dominated by the postulates typical of the Soviet school of law – change required both time and new sources of legal scholarship.[8] Looking back at that period from today's perspective, we see that Lithuania was first reached by the academic works of scholars from the common law tradition, which contained extensive discussion of legal principles (e.g., several books by Dworkin, who highlighted the importance of principles, were published in Lithuanian,[9] Hart's 'The Concept of Law', which presents

7 Alfonsas Klimka et al. *Tarybinė baudžiamoji teisė: bendroji dalis* (Mintis, 1972), 10–11.

8 In 1993, the Lithuanian translation of Mary Ann Glendon, Michael Wallace Gordon, and Christopher Osakwe's *Western Legal Traditions* was published, significantly expanding the boundaries of legal understanding in Lithuania. In 1997, the Lithuanian edition of Roger Cotterrell's *The Sociology of Law: An Introduction* appeared, featuring an extensive introductory essay by Egidijus Kūris on the principal categories of legal theory. In 1999, Valentinas Mikelėnas and Dalia Mikelėnienė published *Court Proceedings: The Process of Interpreting and Applying the Law*, which contained numerous references to Western legal scholarship, primarily from the common law tradition. In 2000, Stasys Vansevičius published *Theory of State and Law*, a work largely grounded in concepts characteristic of Soviet legal scholarship. In the same year, Alfonsas Vaišvila published the textbook *Theories of Law*, which analysed legal categories through the framework of rights and duties and likewise relied extensively on Soviet legal scholarship. Mary Ann Glendon et al." *Comparative Legal Tradition: Text, Materials, and Cases on the Civil and Common Law Traditions, with Special Reference to French, German, English, and European Law* (West Publishing, 1994); Roger Cotterrell, *The Sociology of Law: An Introduction* (Butterworths, 1984); Valentinas Mikelėnas and Dalia Mikelėnienė, *Teismo procesas: teisės aiškinimo ir taikymo aspektai* (Justitia, 1999); Stasys Vansevičius, *Valstybės ir teisės teoria* (Justitia, 2000); Alfonsas Vaišvila, *Teisės teorija: vadovėlis* (Justitia, 2000).

9 Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press, 1977); Ronald Dworkin, *Law's Empire* (Harvard University Press, 1986); Ronald Dworkin, *A Matter of Principle* (Harvard University Press, 1985).

a detailed comparison of norms (rules) and principles, or Posner's publication, which emphasises the inadequacy of legal norms).[10] The works of continental legal scholars reached Lithuanian legal scholarship considerably later, and even today, there are not many translations of these works into Lithuanian.[11] After regaining independence, Lithuanian legal scholarship developed on the basis of the works of common law scholars.

Lithuanian legal science, which separated from the Soviet system, was greatly influenced by the works of Lithuanian legal authorities (e.g., E. Kūris), who promoted the science of common law.[12] In academic discussions, the understanding first took hold that models of how legal principles operate within the legal system can vary, with at least three possible variants being distinguished (Jankauskas, 2004). The first model, in which legal principles are understood as guiding ideas belonging to the realm of legal consciousness rather than normative reality (an approach characteristic of Soviet legal scholarship). The second option is where legal principles exist as elements implicitly embedded in legal texts, which operate to the extent that they are made concrete by legal norms – principles operate to the extent that they can be derived from norms. The third variant, according to which legal principles are understood as elements of the legal system possessing distinctive characteristics and functions, which can independently, without the intervention of legal norms, regulate human relations and transform them into legal relations (principles are recognised as having a binding nature). In Lithuanian legal scholarship, much attention has been devoted to the distinction between legal norms and legal principles, as well as to the operation of principles across different areas of law, for example, in constitutional jurisprudence (Kūris, 2002, 2003; Jankauskas, 2005).[13]

---

10 H. L. A. Hart, *The Concept of Law* (Clarendon Press, 1961); Richard A. Posner, *Problems of Jurisprudence* (Harvard University Press, 1990).

11 Hans Kelsen's *Pure Theory of Law* was published in Lithuanian in 2002, and in 2005 the Lithuanian translation of Robert Alexy's *A Theory of Legal Argumentation* appeared. However, Alexy's work focused primarily on legal argumentation rather than on the structural elements of the legal system. As a result, the distinction between norms-as-rules and norms-as-principles, characteristic of Alexy's theory and widely recognised in German legal scholarship, did not gain broader acceptance in Lithuania. In Lithuanian legal scholarship and judicial practice, a concrete and specifically formulated legal provision is traditionally referred to simply as a legal norm, distinguishing it from a legal principle, which is understood as a more abstract legal standard applicable across a broad range of situations.

12 See the introductory essays by Egidijus Kūris in the Lithuanian editions of Hart, Kelsen, and Cotterrell.

13 Kęstutis Jankauskas, "Teisės principų vaidmuo teisiniame procese," *Jurisprudencija* 59, no. 51 (2004): 137–50; Kęstutis Jankauskas, "Teisės principų samprata ir jų formulavimo teisės

At present, the third and most radical model of how legal principles operate prevails in the Lithuanian legal system (and in legal practice). It is recognised that principles, like legal norms, are elements of the legal system that differ in their degree of abstraction, structure, and other characteristics. It is considered that legal principles function as the most important legal provisions for the law as a whole, guiding the reasoning of those applying the law, assisting in interpreting legal texts, filling gaps in the law, and providing grounds for court decisions. However, it is also noted that legal principles, like legal norms, can be used to classify human behaviour, yielding a legal outcome directly from their application. Legal debates raise questions as to whether such a model of applying legal principles poses a threat to the legislature's ability to establish legal rules and whether it creates conditions for the subjective and inconsistent application of the law.[14] There is a tendency to agree that the greater the significance attached to legal principles, the weaker the determinism of legal norms, which ensures the predictability of court decisions and public confidence in the law. Nevertheless, legal principles remain the most important element of the Lithuanian legal system, without which no lawyer, nor indeed the courts, could function. The active role of the Constitutional Court and its authority within the legal community may have been the impetus for establishing this model of legal principles in Lithuania. This assertion can be illustrated by the example of the constitutional principle of the rule of law, which is particularly frequently applied in the Constitutional Court's case law.

3.2. The Constitutional Principle of the Rule of Law: Premises and Development

The text of the Constitution of the Republic of Lithuania does not explicitly enshrine the constitutional principle of the rule of law. However, the Preamble to the Constitution states that the Lithuanian people adopted and proclaimed the Constitution with the aim of establishing an open, just, and harmonious civil society and a state governed by the rule of law. The Preamble to the Constitution

aiškinimo aktuose ypatumai," *Jurisprudencija* 51, no. 43 (2004): 17–31; Kęstutis Jankauskas, "Teisės principų samprata ir jos įtvirtinimas konstitucinėje jurisprudencijoje" (PhD diss., Mykolas Romeris University, 2005).

14 Giedrė Lastauskienė, "Korektiško teisės principų taikymo prielaidos," *Teisė* 85 (2012): 45–60, https://doi.org/10.15388/Teise.2012.0.48; Valentinas Mikelėnas, "Interpretacinis žaismas, arba kaip kurti teisę be parlamento," *Jurisprudencija* 116, no. 2 (2009): 79–92.

of the Republic of Lithuania was drafted on the basis of a text by the renowned Lithuanian poet Justinas Marcinkevičius. However, according to Vytenis Povilas Andriukaitis, a member of the working group that drafted the Constitution, *it lacked the fundamental cornerstone – the aspiration for an open, just and harmonious civil society and a state governed by the rule of law* (Lastauskienė), and this statement appeared precisely on his (V. P. Andriukaitis') initiative and proposal. Thus, the text of the Constitution enshrines the aspiration for a state governed by the rule of law, which corresponds to the guiding (but not binding/determinative) nature of legal principles.

The year 1999 marked the beginning of the Constitutional Court's doctrine on the principle of the rule of law. The principle of the rule of law was first mentioned in the text of a Constitutional Court ruling on 11 May 1999 – thus, for more than five years from the start of the Court's operations, neither the applicants nor the Court itself had relied on such a principle as an integral part of the Constitution. In the aforementioned ruling, the court merely stated in its reasoning that the principles of the rule of law exist (using the term 'principles' and not referring to these principles as constitutional), the operative part established a conflict with Article 74 of the Constitution, but not with the constitutional principle of the rule of law. In its ruling of 9 November 1999, the Constitutional Court stated that there are constitutional principles of the rule of law (the term 'constitutional' is now included, though the plural form 'principles' is still used), and the applicant in the case did not rely on such principles (no violation of the Constitution was found in the case). In its ruling of 23 November 1999, this principle is again referred to (defined in the singular, without the adjective 'constitutional'; violations of constitutional provisions were established in the case, but no violation of this principle was found). The ruling of 21 December 1999 established that the independence of judges and courts is one of the fundamental principles of a democratic state governed by the rule of law (the term 'democratic' is added to describe the state), the applicant did not rely on this principle; the ruling identified a conflict with specific provisions of the Constitution, but not with the principle mentioned in the court's arguments.

A notable example of this principle in practice is the ruling issued on 23 February 2000 in Case No. 21/98-6/99. In this case, one of the applicants (a group of Members of the Seimas) sought to rely on it as an integral part of the Constitution and a legally binding (rather than a guiding) standard. The group of Members of the Seimas was represented by the aforementioned V. P. Andriukaitis, who, recalling this case, explained: *I was waiting for the moment when an opportunity*

would arise to provoke the Constitutional Court itself into commenting on this fundamental principle. For it is only constitutional principles that underpin constitutional values, which are the very essence of the existence of a civic nation […] without constitutional principles and imperatives, there are no democratic foundations for a civic nation either. This was not only the first time that the Constitutional Court had been asked to examine whether legal regulation was contrary to the constitutional principle of the rule of law, but also the first instance in which a violation of this principle was established.

3.3. The Content and Significance of the Constitutional Principle of the Rule of Law

Having reviewed the Constitutional Court's case law from recent years, we see that the aforementioned principle has become a common and important basis for constitutional review. Of the sixteen cases in which rulings were issued in 2021, the applicants did not invoke this principle in only four cases – in the remaining twelve, they challenged the legal regulation as being contrary to the principle of the rule of law. From the rulings issued in 2022, we see that, of the sixteen cases in which rulings were issued, the applicants sought a finding of a breach of the aforementioned principle in as many as fourteen cases – in all cases where a breach was found, a breach of this principle was also recognised; In 2023, out of thirteen cases in which decisions were made, in seven cases the applicants requested that a violation of the principle of the rule of law be recognised; there are also cases in which the court identified a violation of the principle on its own initiative (decision of 20 December 2023); In 2024, out of fifteen cases in which decisions were made, applicants relied on the principle of the rule of law in ten cases. There are cases in which the court found a violation of the principle even though the applicants did not rely on it (for example, rulings of 12 February 2021, 7 March 2023, 4 June 2023, and 7 November 2024). There have been cases in which appeals were lodged solely on the grounds of a violation of this principle, and the court found such a violation (decision of 24 April 2024).

The scope of this principle is interpreted very broadly in constitutional justice cases – essentially, it covers all areas of the functioning of the state and society: it is stated that this principle is enshrined in the Constitution (Constitutional Court ruling of 23 November 1999); that it determines the fundamental principles of the organisation and operation of the Lithuanian state (Constitutional Court

rulings of 18 October 2000, 25 January 2001, 29 March 2012 and 2 May 2012); according to the Court, the democratic principles of elections to political representative bodies also derive from the imperatives implied by the constitutional principle of the rule of law and must be interpreted in the light of those imperatives (Constitutional Court ruling of 15 February 2019); it is stated that the constitutional principle of the rule of law is a universal principle upon which the entire Lithuanian legal system and the Constitution itself are based; it is stated that the constitutional principle of the rule of law is an exceptionally broad constitutional principle encompassing many interrelated imperatives; its content must be interpreted in light of various other constitutional principles, such as the supremacy of the Constitution, the sovereignty of the people, democracy, responsible governance, the limitation of state powers and the service of state institutions to the people (The Ruling of 13 December 2004 and 17 November 2011). The provisions of the constitutional case law referred to have also become established in legal scholarship. They are used to interpret the content of this principle, highlighting its ambiguity.[15]

The relatively short period of the Constitutional Court's existence (just over thirty years) allows us to identify certain moments that are significant not only for constitutional jurisprudence but also for legal scholarship. For five years, the principle of the rule of law remained enshrined in the Constitution's Preamble and its structure. Five years later, on the applicant's initiative rather than the court's, this legal standard – which is not explicitly enshrined in the Constitution – was identified. The court, having recognised the existence of this element of the Constitution, initially used it as a basis for legal argument rather than as a legal standard, the violation of which directly results in a breach of the Constitution. Subsequently, it became common for applicants to argue that a violation of the rule of law principle rendered the regulation unconstitutional. In constitutional case law, the principle of the rule of law has become established as a legally binding standard determining unconstitutionality. Currently, the court tends

15 Lithuanian legal doctrine recognises that the constitutional principle of the rule of law encompasses a broad range of interrelated imperatives, including the supremacy of the Constitution, the protection of human rights, the separation of powers, equality before the law, judicial independence, the prohibition of retroactive legislation, the protection of legitimate expectations, legal certainty, and legal security. Legal scholarship also distinguishes between formal, substantive, and functional conceptions of the rule of law principle. See Egidijus Jarašiūnas, "Keletas konstitucinio teisinės valstybės principo interpretavimo aspektų Lietuvos konstitucinėje jurisprudencijoje," *Jurisprudencija* 84, no. 6 (2006): 16–24; Donatas Murauskas, "Teisinės valstybės principas: sampratos paieškos doktrinoje," *Teisė* 78 (2011): 168–181, https://doi.org/10.15388/Teise.2011.0.182.

to examine *ex officio* whether the legal regulation contested by the applicant violates the aforementioned principle, even when the applicant does not request such an examination. However, there are doubts as to whether, by acting in this way, the Constitutional Court is not violating the adversarial principle, which, albeit with certain qualifications, nevertheless applies in cases of constitutional jurisdiction.

It can be argued that the constitutional principle of the rule of law was implicitly embedded in the text of the Constitution (as confirmed by those involved in its drafting), but it was in the case law of the Constitutional Court that it was 'discovered' and developed. The Court, which has grown in strength and gained authority within the legal community, did not confine itself to interpreting the Constitution – it fundamentally altered the role of legal principles within the system, elevating one principle to the status of an independent constitutional standard, according to which cases are decided even in instances where there is no apparent contradiction with the text of the Constitution. In this way, the constitutional principle of the rule of law became firmly established in both legal scholarship and legal practice. In Lithuanian constitutional jurisprudence, this principle functions as a higher-level (meta) principle, encompassing various constitutional imperatives. The development of this principle has paved the way for the establishment in Lithuanian law of a model in which legal principles operate directly and intensively to determine legal consequences.

However, such a model of legal principles' operation also poses significant systemic risks. Firstly, the broad and essentially unrestricted application of principles may weaken the legislature's discretion and undermine its ability to establish the chosen legal regulation. Secondly, such a model may violate the imperative of legal certainty, increase the subjectivity of law application, and reduce the predictability of legal decisions, thereby undermining confidence in the law.

4. Conclusions

Following the restoration of Lithuania's independence, a new body began operating within the Lithuanian legal system – the Constitutional Court, which not only exercised the constitutional review of legislation assigned to it, but also influenced legal scholarship and the application of the law. This active, creative, and highly authoritative court formulated a doctrine that was incorporated into legal scholarship and brought about changes throughout the entire Lithuanian legal system. The case law of the Constitutional Court established a model

for the operation of the rule of law, according to which it functions as a binding element of the legal system that determines direct legal outcomes. This model of how legal principles operate within the legal system became established in legal scholarship and, through it, in legal practice. On the one hand, this impetus from an authoritative court enabled a swifter departure from the standard common in Soviet law, where legal principles expressed Soviet ideological principles and had no normative force. On the other hand, such a conception of legal principles also poses significant systemic risks: a) the broad and essentially unrestricted application of principles may weaken the legislature's discretion and undermine its ability to establish the chosen legal framework; b) such a model may violate the imperative of legal certainty, increase the subjectivity of the application of the law, and reduce the predictability of legal decisions.

The Constitutional Court also demonstrated considerable activity in adjudicating constitutional cases relating to the binding nature of judicial precedent (the continuity of judicial practice). In 2006–2007, the Court formulated a normative model of precedent which did not take root in legal practice. This outcome may have been due to the following reasons: a) the Constitutional Court adopted the concept of normative precedent from the common law tradition, and this was incompatible with the customary assessment of precedent in the civil law tradition; b) the doctrine of precedent established by the court is characterised by an internal contradiction, combining the features of normative precedent typical of the common law tradition with the features of precedent as an authority typical of the civil law tradition; c) the model of precedent is described as a certain legal ideal (concept) and it is unclear how this fits with the doctrinal position that all provisions of a Constitutional Court ruling are legally binding. If these provisions are considered binding on all participants in the legal system, doubts arise about their compatibility with the rule enshrined in the Constitution that judges shall adjudicate cases in accordance with the law.

References

Academic and other sources

Alexy, Robert. *Teisinio argumentavimo teorija. Mokymas apie racionalų diskursą arba teisinio pagrindimo teoria*. Teisinės informacijos centras, 2005.

Bilevičiūtė, Eglė, Toma Birmontienė, Darijus Beinoravičius et al., *Lietuvos konstitucinė teisė*. State Enterprise Centre of Registers, 2017.

Cotterrell, Roger. *The Sociology of Law: An Introduction*. Butterworths, 1984.

Cotterrell, Roger. *Teises sociologija: įvadas*, translated by Gediminas Dominas. Dangerta, 1997.

Dworkin, Ronald. *Taking Rights Seriously*. Harvard University Press, 1977.

Dworkin, Ronald. *Rimtas požiūris į teises*, translated by Karolis Klimka. Lietuvos rašytojų sąjungos leidykla, 2004.

Dworkin, Ronald. *Law's Empire*. Harvard University Press, 1986.

Dworkin, Ronald. *Teisės imperija*, translated by Karolis Klimka. Lietuvos rašytojų sąjungos leidykla, 2005.

Dworkin, Ronald. *A Matter of Principle*. Harvard University Press, 1985.

Dworkin, Ronald. *Principo reikalas*, translated by Karolis Klimka. Lietuvos rašytojų sąjungos leidykla, 2006.

Glendon, Mary Ann, Michael W. Gordon, and Christopher Osakwe. *Comparative Legal Tradition: Text, Materials, and Cases on the Civil and Common Law Traditions, with Special Reference to French, German, English, and European Law*. West Publishing, 1994.

Glendon, Mary Ann, Michael W. Gordon, and Christopher Osakwe. *Vakarų teisės tradicijos*, translated by Egidijus Kūris, Arūnas Poviliūnas, Vilija Poviliūnienė. Pradai, 1993.

Hart, H. L. A. *The Concept of Law*. Clarendon Press, 1961.

Hart, H. L. A. *Teisės samprata*, translated by Egidijus Kūris. Pradai, 1997.

Jankauskas, Kęstutis. "Teisės principų vaidmuo teisiniame procese." *Jurisprudencija* 59, no. 51 (2004): 137–150.

Jankauskas, Kęstutis. "Teisės principų samprata ir jos įtvirtinimas konstitucinėje jurisprudencijoje." PhD diss. Mykolas Romeris University, 2005.

Jankauskas, Kęstutis. "Teisės principų samprata ir jų formulavimo teisės aiškinimo aktuose ypatumai." *Jurisprudencija* 51, no. 43 (2004): 17–31.

Jarašiūnas, Egidijus. "Jurisprudencinė konstitucija." *Jurisprudencija* 90, no. 12 (2006): 24–33.

Jarašiūnas, Egidijus. "Quelques aspects de l'interpretation de principe constitutionnel d'etat de droit dans la jurisprudence constitutionnelle lituanienne." *Jurisprudencija* 84, no. 6 (2006): 16–24.

Kelsen, Hans. *Grynoji teisės teoria [Pure Theory of Law]*, translated by Algirdas Degutis, Egidijus Kūris. Eugrimas, 2002.

Klimka, Adolfas et al. *Tarybinė baudžiamoji teisė: bendroji dalis*. Mintis, 1972.

Kūris, Egidijus. "Ko neparašė Rogeris Cotterrellas, arba subjektyvus teisės sociologijos įvado įvadas." In Roger Cotterrell, *Teises sociologija: įvadas*, translated by Gediminas Dominas. Dangerta, 1997.

Kūris, Egidijus. "Hartas ir mes." In H. L. A. Hart, *Teisės samprata*, translated by Egidijus Kūris. Pradai.

Kūris, Egidijus. "Grynoji teisės teorija, teisės sistema ir vertybės: normatyvizmo paradigmos iššūkis." In Hans Kelsen, *Grynoji teisės Teoria*, translated by Algirdas Degutis, Egidijus Kūris. Eugrimas, 2002.

Kūris, Egidijus. "Konstituciniai principai ir Konstitucijos tekstas (1)." *Jurisprudencija* 23, no. 15 (2001): 46–70.

Kūris, Egidijus. "Konstituciniai principai ir Konstitucijos tekstas (2)." *Jurisprudencija* 24, no. 16 (2002): 57–70.

Lastauskienė, Giedrė. "Korektiško teisės principų taikymo prielaidos." *Teisė* 85 (2012): 45–60. https://doi.org/10.15388/Teise.2012.0.48.

Mikelėnas, Valentinas. "Interpretacinis žaismas, arba kaip kurti teisę be parlamento." *Jurisprudencija* 116, no. 2 (2009): 79–92.

Mikelėnas, Valentinas, and Dalia Mikelėnienė. *Teismo procesas: teisės aiškinimo ir taikymo aspektai*. Justitia, 1999.

Murauskas, Donatas. "Teisinės valstybės principas: sampratos paieškos doktrinoje." *Teisė* 78 (2011): 168–181. https://doi.org/10.15388/Teise.2011.0.182.

Posner, Richard A. *Problems of Jurisprudence*. Harvard University Press, 1990.

Posner, Richard A. *Jurisprudencijos problemos*, translated by Audrius Paksas, Michail Cvelich, Tomas Gulbinas. Eugrimas, 2004.

Sinkevičius, Vytautas. "Konstitucijos interpretavimo principai ir ribos." *Jurisprudencija* 67, no. 59 (2005): 7–19.

Steniulienė, Ingrida. "Prokuratūra: po LAT sprendimo Sinkevičiaus byloje daugelis jaučiasi nejaukiai." *LTR*, March 23, 2025. https://www.lrt.lt/naujienos/lietuvoje/2/2518892/prokuratura-po-lat-sprendimo-sinkeviciaus-byloje-daugelis-jauciasi-nejaukiai?srsltid=AfmBOordl1MU3exQuEcg_dS9tvFdNtll8_b_IFKVkLOG6cyZIaTEoPZS.

Vaišvila, Alfonsas. *Teisės teorija: vadovėlis*. Justitia, 2000.

Vansevičius, Stasys. *Valstybės ir teisės teoria*. Justitia, 2000.

Legislation and case law

Constitutional Court of the Republic of Lithuania. Ruling in case no. 3/99-5/99. May 11, 1999.

Constitutional Court of the Republic of Lithuania. Ruling in case no. 15/98. November 9, 1999.

Constitutional Court of the Republic of Lithuania. Ruling in case no. 17/98. November 23, 1999.

Constitutional Court of the Republic of Lithuania. Ruling in case no. 16/98. December 21, 1999.
Constitutional Court of the Republic of Lithuania. Ruling in case no. 21/98-6/99. February 23, 2000.
Constitutional Court of the Republic of Lithuania. Ruling in case no. 51/01-26/02-19/03-22/03-26/03-27/03. December 13, 2004.
Constitutional Court of the Republic of Lithuania. Ruling in case no. 33/03. March 28, 2006.
Constitutional Court of the Republic of Lithuania. Ruling in case no. 26/07. October 24, 2007.
Constitutional Court of the Republic of Lithuania. Ruling in case no. 14/2011-35/2011. November 17, 2011.
Constitutional Court of the Republic of Lithuania. Ruling in case no. 21/2010-30/2010. March 29, 2012.
Constitutional Court of the Republic of Lithuania. Ruling in case no. 2/2009. May 2, 2012.
Constitutional Court of the Republic of Lithuania. Ruling in case no. 18/2018. February 15, 2019.

Abstract

The Case Law of the Constitutional Court of the Republic of Lithuania as a Source of Authority: A Case Study

This article examines the role of the Constitutional Court of the Republic of Lithuania in shaping the Lithuanian legal system after the restoration of independence. It shows that the Court's jurisprudence functions not only as a source of constitutional interpretation but also as an influential source of normative authority influencing legal doctrine and judicial practice. The analysis focuses on two main areas of constitutional jurisprudence: the doctrine of binding judicial precedent and the development of the constitutional principle of the rule of law. The article demonstrates that although a precedent model closer to the common law tradition did not take root in the Lithuanian legal system, the constitutional principle of the rule of law has become a central constitutional category with direct normative effect. The study concludes that the Constitutional Court's jurisprudence has significantly transformed the Lithuanian legal system, while also generating new challenges in the area of legal certainty.

Keywords: Constitutional Court of Lithuania, constitutional jurisprudence, rule of law, legal principles, judicial precedent, constitutional interpretation, legal transformation, post-Soviet legal systems

Santrauka

Lietuvos Respublikos Konstitucinio Teismo praktika kaip autoriteto šaltinis: atvejo analizė

Straipsnyje analizuojamas Lietuvos Respublikos Konstitucinio Teismo vaidmuo formuojant Lietuvos teisės sistemą po nepriklausomybės atkūrimo. Tyrimas atskleidžia, kad Teismo jurisprudencija veikė ne tik kaip Konstitucijos aiškinimo šaltinis, bet ir kaip normatyvinės galios centras, darantis poveikį teisės doktrinai ir teismų praktikai. Daugiausia dėmesio skiriama dviem Konstitucinio Teismo jurisprudencijos sritims: teismų precedento privalomumo doktrinai ir konstitucinio teisinės valstybės principo plėtrai. Straipsnyje parodoma, kad nors precedento modelis, artimas bendrosios teisės tradicijai, Lietuvos teisinėje sistemoje neįsitvirtino, teisinės valstybės principas tapo centrine konstitucine kategorija, turinčia tiesioginį normatyvinį poveikį. Daroma išvada, kad Konstitucinio Teismo jurisprudencija reikšmingai transformavo Lietuvos teisės sistemą, tačiau kartu sukėlė naujų iššūkių teisinio tikrumo srityje.

Pagrindiniai žodžiai: Lietuvos Respublikos Konstitucinis Teismas, konstitucinė jurisprudencija, teisinė valstybė, teisės principai, teismų praktika, konstitucinis aiškinimas, teisinė transformacija, posovietinės teisinės sistemos

The Intersections of Criminal, Administrative and Civil Law:
International and National Contexts, pp. 221–250
https://doi.org/10.12797/9788383685328.10

Dace Šulmane
Turiba University, Faculty of Law
dace.sulmane@turiba.lv

Gabrielė Juodkaitė-Granskienė
Vilnius University, Faculty of Law
gabriele.juodkaite-granskiene@tf.vu.lt

Rodica Ciobanu
Moldova State University, Faculty of Law
rodica.ciobanu@usm.md

Disciplinary Responsibility of Judges for Breaches of Ethics – Three Countries Perspective in Light of European Standards

1. Introduction

The judiciary's distinct role in maintaining the daily operations of a constitutional state coexists with the principle of life tenure for judges. As a lifelong career, the judiciary demands neutrality and professionalism that must not only be preserved within the legal community, but also visibly demonstrated to the public, since societal trust in the branches of government is fundamental to the resilience of democratic values. The measures adopted at the national level to ensure a justice system that meets the society's expectations have revealed, on the one hand, objective difficulties in advancing reforms and, on the other hand, systemic resistance and a lack of trust in the government's genuine commitment to fulfilling its reform pledges. Judicial independence is essential to ensure that judicial proceedings are fair and capable of providing

effective judicial protection of individual rights.[1] Democratising societies rely heavily on judges, but disciplining them creates a delicate balancing act between accountability and judicial independence.

2. Importance of the System of Disciplinary Liability

The existence of a framework for disciplinary liability is self-evident in the working environment of any sector, and it serves as a self-organising and, at the same time, deterrent and cautionary instrument. The application of disciplinary liability does not always mean that the person being held liable has acted in bad faith. In working life, a combination of different situations and circumstances tends to occur, which triggers the protective mechanism of the profession, and therefore crucial importance lies with those institutions that have the right to both initiate a disciplinary case and to examine it and make decisions. Judges' disciplinary liability is a rarely applied mechanism, because in every country, individuals of high professionalism become judges, whose authority, knowledge, and integrity have already been scrupulously evaluated before appointment to judicial office.

The significance of the regulatory framework for disciplinary liability and the practical approaches adopted by various countries to address these issues is underscored by the 2024 opinion published by the Consultative Council of European Judges (CCJE).[2] The CCJE's opinion provides guidance to member states on this sensitive issue, largely based on the questionnaires, opinions, and good practices submitted by the member states themselves. At the same time, an academic vision is essential in the development of opinions, which can make the topic of judicial integrity a part of a broader range of rule of law issues.

The opinion outlines several core recommendations for judicial discipline. First, it emphasises that disciplinary actions must be governed by fair, autonomous procedures, with the bodies responsible for initiating and

---

1 European Union. Consolidated Versions of the Treaty on European Union: Article 19. Official Journal of the European Union. C202/27. July 7, 2016.https://eur-lex.europa.eu/eli/treaty/teu_2016/art_19/oj/eng; European Parliament. Article 47 of the Charter of Fundamental Rights of the European Union. Official Journal of the European Communities. 2000/C 364/01. December 18, 2000. https://www.europarl.europa.eu/charter/pdf/text_en.pdf.

2 CCJE Opinion No. 27 (2024) on the disciplinary liability of judges, Council of Europe, "Strengthening disciplinary liability of judges while safeguarding their independence," December 13, 2024, https://www.coe.int/en/web/portal/-/renforcer-la-responsabilit%C3%A9-disciplinaire-des-juges-tout-en-prot%C3%A9geant-leur-ind%C3%A9pendance.

adjudicating cases strictly insulated from executive and legislative interference. Second, to safeguard due process under Article 6 of the European Convention on Human Rights, judges must possess full participatory rights, including the right to appeal. Third, judicial decision-making – specifically the interpretation of law and evaluation of evidence – must be legally protected; such actions should never incur disciplinary liability unless driven by malice or gross negligence. Furthermore, any imposed penalties must be transparent and proportionate, drawn from a predefined, exhaustive list, with dismissal reserved strictly as a measure of last resort. Finally, the opinion clarifies that vetting mechanisms must function independently and never serve as a substitute for standard disciplinary proceedings.

The ECJ[3] has established that judicial independence requires that the rules and conditions governing appointments within the justice system need to be sufficient to prevent any reasonable doubt on external influence of judges. The case law of both the ECHR and the ECJ, for example, regarding the disciplinary liability of judges, emphasised that such a mechanism – which is essential to the self-governance of the judiciary – must not allow for political control over the substance of judges' rulings. Both European courts, in support of one another, noted that *[i]f the state initiates disciplinary proceedings [against a judge], public confidence in the functioning and independence of the judiciary is at stake; [whereas] in a democratic state, such trust is a guarantee of the rule of law*.[4]

Latvia and Lithuania, as EU member states, went through a trajectory of control and compliance more than 20 years ago, which ensured the countries' conformity with the high EU standard. Presently, Moldova is still in this process of transformation. Simultaneously, it must be acknowledged that internally, the development path of each country depends on the determination of the drivers of reforms, as well as the internal pressure and striving for excellence

---

3 Court of Justice of the European Union, European Commission v Republic of Poland, case C-791/19, July 15, 2021; Court of Justice of the European Union, Repubblika v Il-Prim Ministru, case C-896/19, April 20, 2021; Court of Justice of the European Union, A.B. and Others v. Krajowa Rada Sądownictwa, case C-824/18, March 2, 2021. Quoted in: European Commission. Communication From the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. 2025 Rule of Law Report. COM (2025) 900 final. July 8, 2025.

4 European Court of Human Rights, Case of Ramos Nunes de Carvalho e Sá v. Portugal, applications nos. 55391/13, 57728/13 and 74041/13, November 6, 2018, para. 196; European Court of Human Rights, Case of Eminağaoğlu v. Turkey, application no. 76521/12, March 9, 2021, para. 97.

of the judiciary itself, in order to maintain the highest principles of integrity within their profession. In this respect, what Moldova has accomplished does not significantly differ from many EU member states.

The justice system in Moldova has been under reform for many years,[5] evolving along a complex and uneven path, and oscillating between limited interventions with modest impact and current efforts targeting systemic transformation. For a long period, the reforms were more declarative than substantive: they focused on isolated normative amendments, formal institutional reorganisations, or technical adjustments to the legal framework, without addressing the underlying causes of systemic dysfunctions. This kind of 'superficial reform' generated scepticism and preserved the structural vulnerabilities of the system – political dependence, lack of integrity in certain areas, low efficiency, and inconsistency in justice administration. In this regard, an overview of the reforms made is presented in the *Level of implementation of the strategy on ensuring the independence and integrity of the justice sector for 2022–2025*, which represents a retrospective analysis of how, since 2007, the policies aimed at reforming the justice system have evolved. It also points out that prolonged political crises have led to *a lack of a strategic vision for the justice sector and deprived the sector of a genuine strategic approach*.[6]

In Moldova, the implementation of the external evaluation procedure,[7] designed to rebuild an institutional contract based on merit, ethics, and accountability, brought serious integrity issues[8] to the forefront and caused operational blockages in the Courts of Appeal and the Supreme Court of Justice. In this context, the initiation of the evaluation process for the judges of the Supreme Court of Justice in 2023 led to the resignation of 90% of judges, while the initiation

5 Note: *"The Strategy on Ensuring the Independence and Integrity of the Justice Sector for 2022–2025 and the Action Plan for its Implementation"* outlines the steps undertaken to reform the justice sector.

6 *Nivelul de implementare a strategiei pricind asigurarea independenței și integrității sectorului justiției pentru anii 2022–2025* (Transparency international Moldova, 2024), p.12, https://www.old.transparency.md/2024/07/22/nivelul-de-implementare-a-strategiei-privind-asigurarea-independentei-si-integritatii-sectorului-jusitiei-pentru-anii-2022–2025/.

7 Rodica Ciobanu and Valria Ursu, "External Judicial Vetting: The Axis of Safety for the Republic of Moldovas Accession to the European Union," in *CEEeGov '25: Proceedings of the Central and Eastern European eDem and eGov Days 2025* (Association for Computing Machinery, 2026), 189–197, https://doi.org/10.1145/3773002.3773014.

8 Rodica Ciobanu, "Criza de integritate și provocările justiției de tranziție," in *Statul, securitatea și drepturile omului în era digital = State, Security and Human Rights in Digital Age: conferință științifico-practică internațională, Chișinău, 12-13 decembrie 2024* (Lexon Prim, 2025), 48-63, https://doi.org/10.59295/ssdoed2025.03.

of the evaluation of the Chișinău Court of Appeal in 2024 led to the resignation of 50% of judges. The implementation of the external evaluation mechanism for representatives of the justice system generated both progress and structural challenges that continue to limit the reform's impact, as well as criticisms that fuel reluctance regarding its success. Vetting process produced an unprecedented effect of cleaning and accountability: integrity, professionalism, and ethical criteria were prioritised, and a significant portion of judges and prosecutors underwent evaluation.

An important document guiding the reform process is the *Strategy on Ensuring the Independence of the Justice Sector for 2022–2025*,[9] which is structured around three pillars: 1) Independence, accountability, and integrity of justice sector actors; 2) Access to justice and quality of justice administration; 3) Efficient and modern administration of the justice sector. Unlike previous policy documents, this strategy is centred *on development and, where appropriate, the consolidation or effective use of the justice sector potential. (...) It focuses on strengthening the institutional and professional capacities of reformed institutions, aligning justice reform processes with the recommendations and standards of relevant international instruments, as well as with the commitments undertaken by the Republic of Moldova*.[10] To improve the quality of judicial services, the Ministry of Justice has drafted and implemented several policies,[11] which aim to improve the efficiency of disciplinary mechanisms for judges.

The framework of judicial disciplinary liability does not operate within a legal vacuum in any jurisdiction; rather, it exists in tandem with other forms of judicial accountability. Parallel to disciplinary measures, a legal system may

---

9 The Parliament of Republic of Moldova, The Strategy on Ensuring the Independence and Integrity of the Justice Sector for 2022–2025 and the Action Plan for its Implementation, Monitorul Oficial, No. 325-333, December 31, 2021, https://www.legis.md/cautare/getResults?doc_id=129241&lang=ro.

10 The Parliament of Republic of Moldova, The Strategy on Ensuring the Independence and Integrity of the Justice Sector.

11 The Parliament of Republic of Moldova, The Law no. 65 of March 30, 2023 on the External Evaluation of Judges and Candidates for the Position of Judge of the Supreme Court of Justice, Monitorul Oficial. No. 117-118. April 6, 2023, https://www.legis.md/cautare/getResults?doc_id=140455&lang=ru; The Parliament of Republic of Moldova. The Law no. 252 of August 17, 2023 on the External Evaluation of Judges and Prosecutors and Amendments of Some Regulatory Acts. Monitorul Oficial. No. 325-327, https://www.legis.md/cautare/getResults?doc_id=145198&lang=ro; The Parliament of Republic of Moldova, Introduction of Law No. 5 of February 2, 2023 to Amend Some Normative Acts (Disciplinary Liability of Judges and the Work of the Judical Inspection). Monitorul Oficial. No. 53-56 art. 92. February 18, 2023, https://www.legis.md/cautare/getResults?doc_id=135622&lang=ro.

incorporate mechanisms for civil liability, criminal liability, or a combination of both. It is plausible to deduce that these punitive and corrective instruments are, at least partially, functionally interchangeable. Specifically, in jurisdictions where criminal proceedings are initiated against judges even for relatively minor infractions, the systemic relevance of disciplinary liability diminishes. Conversely, in legal systems where criminal prosecution or civil damages claims against members of the judiciary are rare, a more pervasive application of disciplinary liability finds greater institutional justification and necessity. The system for examining disciplinary cases in the three countries highlights its relevance and necessity, as well as the constant opportunities for its improvement. The number of judges (official judicial posts) to whom the mentioned regulation formally applies in the countries reviewed in the article is as follows (2026 data): Latvia – 548 judges, Lithuania – 786, Moldova – 528.[12]

3. Evaluating the Quality and Accountability of a Judge: Citizen Complaints

In recent years, all European judicial systems have been marked by constant pressure from society and policymakers regarding the need to discipline judges, which has placed significant tension on the self-governing bodies. Excessive expectations from the society regarding the eradication of corruption in the judicial system and, ultimately, the 'cleaning' of the system. The mistaken interpretation that self-governing bodies are capable of eliminating corruption through disciplinary procedures has fuelled unrealistic expectations. Whether an individual has the opportunity to initiate disciplinary proceedings against a judge is, perhaps, a procedural matter of little consequence, provided the result is achieved: under certain, strictly defined legal criteria, the shortcomings or inappropriate conduct in a judge's work identified by a citizen logically lead to disciplinary proceedings.

12 Note: According to the provisions of Article 21, paragraph 2, of Law No. 514 of 1995, 504 judicial positions are established for all courts. Since 2025, an increase to 528 positions has been set. Of the total 528 positions, 326 are currently staffed, and 184 are vacant. The difference of 18 positions shall be allocated to the Superior Council of the Judiciary following an analysis of the courts' distribution. Parliament of Republic of Moldova, The Law no. 154 of July 5, 2012 on Superior Council of Magistrates, Monitorul Oficial, no. 190-192, September 14, 2012, https://www.legis.md/cautare/getResults?doc_id=106368&lang=ro.

In Moldova, according to the Annual Report of the Judicial Inspection in 2024[13] a total of 1,295 complaints were registered for examination, with a backlog of 62 complaints from 2023. During the year, 1,104 complaints were examined, while 73 remained pending for 2025. As a result of their examination, the Judicial Inspection decided as follows: – 637 complaints were rejected, on the grounds that no reasonable basis was found for classifying the actions of the judge(s) concerned as any of the disciplinary offences provided by law; 336 complaints were returned, due to failure to meet the formal and substantive requirements, such as: lack of the complainant's signature, failure to indicate the judge's actions that could constitute disciplinary offences, lack of supporting evidence, failure to indicate the name of the judge concerned, etc.; 90 complaints were declared inadmissible; 27 reports initiating disciplinary proceedings were issued; the remaining cases were merged with other related complaints. A similar situation was observed in 2025,[14] when 1,022 complaints were examined, of which 601 were rejected, 252 were returned, 72 were declared inadmissible, and 35 reports initiating disciplinary proceedings were issued.

The largest number of complaints concern disagreement with judgements, rulings, and decisions issued by courts. In Moldova, the Disciplinary Board may establish the existence of a disciplinary offence and apply disciplinary sanctions to sitting judges, resigned judges, as well as to presidents and vice-presidents of courts, only if it finds that the alleged act was committed intentionally or as a result of gross negligence. Disciplinary sanctions constitute coercive measures provided by law which, in addition to their educational, moralising, and coercive character, aim to safeguard the prestige of the judiciary, to foster a sense of responsibility in the conscientious exercise of the judicial office, and to prevent judges from violating the prescribed standards of conduct. At the same time, the Disciplinary Board may additionally formulate a recommendation addressed to the Superior Council of Magistracy to order an extraordinary evaluation of the judge's performance, if the circumstances and materials of the case demonstrate the necessity of such an evaluation.

Following the examination of a disciplinary case, the Disciplinary Board may decide to either terminate the disciplinary procedure or establish the existence of a disciplinary offence and impose a disciplinary sanction. The disciplinary sanctions that may be applied to judges are: – warning, with a validity period

13 Counsiliul Superior al Magistraturii Inspecţia Judiciară, *Raport annual de activitate*, 2024, https://www.csm.md/files/RAPOARTE/2024/RAPORT-IJ-2024.pdf.

14 Counsiliul Superior al Magistraturii Inspecţia Judiciară, *Raport annual de activitate*,2025, https://www.csm.md/files/RAPOARTE/2025/RAPORTIJ2025final.pdf.

of one year; – reprimand, with a validity period of two years; – dismissal from the position of judge (decision adopted by the Superior Council of Magistracy – CSM); – removal from the position of president or vice-president of a court (decision adopted by the CSM). Appeals against the decisions of the Disciplinary Board are submitted to the Superior Council of Magistracy (CSM) through the Board. Decisions of the CSM may be further appealed to the Supreme Court of Justice.

It is worth noting that complaints regarding the violation of the deadline for drafting court decisions in all three countries are often found to be justified. However, in some cases of clear exceeding of the legal drafting deadline (for example, 1 year), it was concluded that the delay, considering both its duration and factual reasons, cannot always be attributed to the judge. Understanding that the justice reform process may cause temporary adverse effects for judges, such as excessive workload, overbooked schedules, incomplete teams, or the judge being temporarily incapacitated to work etc., judicial inspectors take all circumstances into account when deciding on disciplinary accountability. Accordingly, in these cases, the following qualifying elements have been considered: the significant length of the delay, the attitude of the judge and the steps taken to remedy the violation, the degree of harm to the complainant or litigant, and the frequency of such occurrences admitted by the judge in their professional activity. Additionally, in the period 2024–2025 in Moldova, a relatively new trend in complaints was observed: these complaints were submitted by judges regarding the allegedly illegal actions of colleagues within the same court, or by court staff concerning the court president, as well as by judges from higher courts regarding the actions of judges in the trial or appellate courts, including interlocutory rulings concerning trial court judges, which were subsequently registered and reviewed as formal complaints.

Most of the submissions received by the Lithuanian Commission in 2025 concerned judges' jurisdictional activities, but six submissions were also received regarding judges' conduct outside the direct performance of their duties, such as drunken driving, disrespectful behaviour in public places, posts on a private social network, sports activities, travel during working hours, etc. Most of these complaints were not accepted for review.

In Lithuania, a fairly large proportion of complaints (about 20 percent) still concern judges' conduct during court hearings. Most often, the circumstances described in the complainants' submissions are not substantiated – judges behave professionally and courteously during court hearings, and the Commission generally views an occasional raised voice by a judge, interrupting a party's

speech, or making a stern remark – are generally viewed by the Commission as the fulfilment of the duty to preside over the proceedings and an effort to ensure that circumstances relevant to the case are examined in a focused manner, without straying from the substance of the case.

So, the key trends may be followed, which mainly show that a stricter approach to violations of procedural rules is taken. The Court of Honour is increasingly emphasising in its motivation the efficiency of proceedings; compliance with deadlines defined by the procedural laws; proper use of LITEKO (the software used for administration of the cases); and application of clear procedural order.

The Court of Honour also indicates the growing emphasis on the work environment and workplace bullying. In recent cases significant attention is paid to the psychological climate; employee protection; standards of respectful communication.[15]

The Court of Honour also noted that the judge's communication is becoming a significant part of ethical evaluation. Social media, public comments, and internal communication are viewed as directly related to a judge's reputation capable of undermining public trust. Also, a lot of emphasis is placed on protecting institutional authority. Decisions consistently reiterated that a judge's conduct is evaluated not only on an individual basis, but an important part related to its impact on trust in the entire judicial system.

Isolated communication-related or minor violations usually result in a note (remark); systematic procedural violations result in a note (remark) or a severe reprimand; repeated similar violations lead to stricter sanctions; violations of impartiality and conflicts of interest are considered the most serious and may result in a recommendation to remove the judge from office (2 cases).

The general trend in Latvia, Lithuania and Moldova is an increasing focus not only on the formal application of the law, but also on: judicial communication;

---

15 The case concerned chairpersons of the court inappropriate communication with judges and staff; possible workplace bullying; public humiliation of other judges (for example, by saying: *Look at what the judge looks like – she'll bring shame on the court, the level of the bus station, she can't be trusted, below the belt, she's a fool; the Judicial Council is just pushing her around, ruining my reputation, she can only go to yoga, not for interviews, I'll throw up; she disgusts me, lost among three pine trees, judges like this shouldn't be allowed among people, she's a disgrace, she's going against the court, it was disgusting to talk to her, called judge 'idiot'*, etc.); an aggressive management style; pressure regarding procedural decisions; prohibiting judges from commenting on their own decisions. The decision focused extensively on: the humiliation of colleagues; the use of offensive language; the intimidation of judges; the creation of a negative work environment, (Judicial Court of Honour of the Republic of Lithuania, decision no.. 21P-2, October 13, 2025, https://www.teismai.lt/data/public/uploads/2025/12/tgt-sprendimas-teisejo-a.-purvainio-drausmes-byloje_nuasmenintas.pdf.

the emotional climate; institutional trust; professional standards of conduct both inside and outside the courtroom. Increased focus on communication and the workplace atmosphere is also emphasised, significant attention is paid to the emotional atmosphere; the tone of communication; signs of workplace bullying; respectful leadership.

A mechanism for submitting requests and complaints that allows citizens to express their opinions, suspicions, complaints, or criticism regarding the work of the courts is a necessary 'barometer' for society, one that tends to reveal shortcomings in the work of the courts – shortcomings that the government itself is not always objectively capable of identifying (it is precisely this external perspective and public assessment that serve as a necessary mechanism for feedback – to the legislature and the executive branch through the electoral process, on the judiciary – through complaints about judicial misconduct and through appeals of judgements to a higher court).

4. Initiators and Adjudicators of Disciplinary Cases: The Critical Significance of Mandates

The disciplinary liability of judges represents one of the key mechanisms for ensuring their accountability. CoE Recommendation 94(12) on the independence, efficiency and role of the judges already includes principles on the accountability of judges.[16]These principles were updated by CoE Recommendation 2010(12) on the independence, efficiency and responsibilities of judges.[17] CoE Recommendation (2010)12 requires that disciplinary proceedings against judges are conducted by independent bodies or the courts, ensuring full observance of the guarantees of a fair trial. In addition, judges must be granted the right to appeal the decision of the disciplinary body.

Accordingly, the European Charter on the Statute for Judges provides for the possibility of disciplinary proceedings before a competent authority and the

16 Council of Europe, Recommendations of the Committee of Ministers to Member States on the Independence, Efficiency and Role of Judge, no. R (94) 12, October 13, 1994 (Adopted by the Committee of Ministers on 13 October 1994 at the 518th meeting of the Ministers' Deputies), https://search.coe.int/cm?i=09000016804c84e2.

17 Council of Europe, Recommendation of the Committee of Ministers to Member States on Judges: Independence, Efficiency and Responsibilities, no. CM/rec (2010) 12, November 17, 2019 (Adopted by the Committee of Ministers on 17 November 2010 at the 1098th meeting of the Ministers' Deputies), https://search.coe.int/cm#{%22CoEIdentifier%22:[%2209000016805afb78%22],%22sort%22:[%22CoEValidationDate%20Descending%22]}.

imposition of a disciplinary sanction against a judge *following the proposal, the recommendation, or with the agreement of a tribunal or authority composed at least as to one half of elected judges, within the framework of proceedings of a character involving the full hearing of the parties, in which the judge proceeded against must be entitled to representation*.[18]

Trust in the judicial system cannot exist without transparency and accountability. In a democratic country, individuals must have the opportunity to effectively voice their concerns, doubts, and complaints regarding their negative experiences with the judiciary. Such an opportunity to appeal must not be illusory or merely formal. Therefore, within the scope of this article, it is important to identify and describe how, in three countries (Latvia, Lithuania, Moldova), citizens are provided with the opportunity to verify for themselves the proper functioning of the courts. Equally, and no less important, is the judiciary's own ability to 'self-regulate', to strictly uphold standards of conduct and integrity among its members, as well as the role and powers of the Minister of Justice in initiating disciplinary proceedings. It is no coincidence that in 2026, the European Network of Councils for the Judiciary (ENCJ) emphasised in its declaration: *High standards of judicial ethics must be upheld, supported by appropriate guidance and training. Where necessary, fair and clearly regulated disciplinary procedures must be ensured*.[19]

Only through an in-depth analysis of the judicial system is it possible to trace the shifts that occur over the years as a country's framework for disciplinary proceedings evolves. Over the past decade, the regulatory frameworks of each country examined in this article have undergone an evolution fundamentally oriented toward strengthening judicial independence – a process that does not occur automatically. In a sense, it must be acknowledged that the judiciary itself must demonstrate its capacity to organise, supervise, and objectively and rigorously monitor the integrity of its own profession. This is essential for the system to exhibit a consistent and strict approach, thereby eliminating the syndrome of institutional insularity (the 'protection of one's own') and dispelling public scepticism regarding the efficacy of the complaint process and the visibility of sanctions imposed on unfit judges.

---

18 Lorena Bachmaier, "Disciplinary Sanctions Against Judges: Punitive but not Criminal for the Strasbourg Court," *Eucrim* 17, no. 4 (2022): 260–265, https://doi.org/10.30709/eucrim-2022-018.

19 General Assembly of European Network of Councils for the Judiciary, Declaration of Paris 2026 'Trust in the Judiciary', June 5, 2026 (Adopted in General Assembly of European Network of Councils for the Judiciary), para 5, https://pgwrk-websitemedia.s3.eu-west-1.amazonaws.com/production/pwk-web-encj2017-p/Adopted%20Declaration%20of%20Paris%20'Trust%20in%20the%20Judiciary'.pdf.

In addressing whether Latvia, Lithuania, and Moldova share an identical approach to initiating disciplinary proceedings, the answer is negative. In contrast to Lithuania and Moldova, it is impossible in Latvia to initiate a disciplinary case based directly on a complaint by a party to the proceedings (an affected individual). This is due to an inherent procedural filter within the system, as individuals lack the legal standing to address their complaints regarding judicial conduct directly to the Judicial Disciplinary Committee. Instead, a person must submit their complaint to the chairperson of the respective court, the chairperson of a higher court, or the Minister of Justice (concerning the conduct of first- and second-instance judges).[20] In Latvia, the Chief Justice of the Supreme Court has the authority to initiate disciplinary proceedings against any judge. The Minister of Justice, in turn, has this authority regarding judges of district (city) courts and regional courts. The right to initiate disciplinary proceedings is also held by the presidents of regional courts and the presidents of district (city) courts, as well as the Judicial Ethics Commission. Thus, there are already ample opportunities to report potential judicial misconduct both within the judiciary and outside of it.

If a citizen mistakenly addresses a complaint to the Council for the Judiciary or to the Judicial Disciplinary Committee itself, the submission is forwarded – most likely to the relevant court chairperson – to determine whether sufficient grounds exist to petition the disciplinary committee to initiate a case. Furthermore, the Judicial Ethics Commission (which is a separate judicial self-governing body, unlike in Lithuania where these functions are unified) is also authorised to petition the Committee.

The composition of the bodies responsible for adjudicating disciplinary cases also reflects diverse structural approaches. In Lithuania, for instance, these bodies include public representatives. Conversely, in Latvia, the composition is restricted exclusively to judges themselves, meaning that the system operates under a peer-review model to adjudicate cases involving its own members. Lithuania has developed an approach stating that candidates for the Judicial Ethics and Disciplinary Commission are nominated by several institutions, thereby ensuring broad shared responsibility among other institutions, as well as an 'outside perspective', which can be a significant argument for justifying judges' accountability to the public at critical moments.

In Moldova, too, it is ensured that not all those involved in the examination of disciplinary cases are colleagues (some members of the institution are *expressis verbis* not judges).

---

[20] The Parliament of the Republic of Latvia, Judicial Disciplinary Liability Law, November 24, 1994, art.3, https://likumi.lv/ta/en/en/id/57677-judicial-disciplinary-liability-law.

In 2020, legislative amendments were enacted in Latvia to strengthen the methodology governing the application of disciplinary liability. Given that Latvian law has excluded judicial immunity in administrative offence cases since 2020, amendments were introduced to repeal the provision allowing a judge to be held disciplinarily liable directly for an administrative infraction. Concurrently, the link to evaluating judicial conduct through disciplinary channels was preserved: a judge is held disciplinarily liable not for the administrative offence itself, but rather if the underlying infraction constitutes a gross violation of the judicial code of ethics, or if the nature of the administrative offence compromises the dignity of the judicial office.

Furthermore, practice demonstrated that judicial misconduct is occasionally discovered after the statutory two-year limitation period has expired. A comparative assessment of international frameworks revealed that the statutes of limitations for imposing judicial disciplinary sanctions vary significantly across jurisdictions, encouraging them to lengthen the term for initiation of the disciplinary proceedings from 2 to 4 years.[21] Another noteworthy characteristic is that among the three countries examined, court presidents appear to hold the most prominent role in initiating disciplinary proceedings in Latvia.

In Lithuania, the Judicial Ethics and Discipline Commission[22] is an institution of autonomy of courts deciding the issues of instituting disciplinary actions against judges. As it can be seen this commission is unified for both aspects – ethics and disciplinary issues.

In Lithuania, the case against judge on possible breach of Code of Ethics, including disciplinary actions, may be initiated only by the Commission, which does the filtering of appeals. The appeal to this commission may be given by: the Council of Judges, as well as the president of the court where the judge serves, or the president of any higher-level court, or any other person who has become aware of a violation. Requests by individuals to initiate disciplinary proceedings, which identify the judge who committed a specific violation and provide arguments substantiating that violation, shall be considered as motions to initiate disciplinary proceedings.

---

21 For instance, in France and the Czech Republic, disciplinary sanctions may be imposed within three years from the date the infraction was committed, whereas in Poland and Malta, the limitation period is five years. Slovakia prescribes three distinct tiers – specifically one, three, and five years – while Germany applies a range from two to seven years, depending on the severity of the offence.

22 Lithuanian Courts, "About Commission," last modified June 10, 2020, https://www.teismai.lt/en/self-governance-of-courts/judicial-ethics-and-discipline-commission/about-commission/667.

A disciplinary action may not be instituted after a lapse of more than three years from the moment of commission of the violation. In Latvia in 2020, the statute of limitations for disciplinary liability was extended from two to four years.

It is generally accepted that disciplinary cases are heard by a collegial body. The fact that the legislature determines the composition of this body, in a sense, illustrates the state's stance toward the realisation of the concept of judicial independence.

Furthermore, the manner in which the members of this body are nominated and elected, to a greater or lesser extent, nevertheless indicates either greater autonomy for the body or, conversely, interference from other branches of government. In Latvia, there is a strictly autonomous system of disciplinary accountability, as the judiciary alone nominates members, and the composition of disciplinary committee and disciplinary court consist solely of judges.

In Lithuania the two-level system is introduced for investigation ethical and disciplinary issues of judges' activities. They are; Judicial Ethics and Discipline Commission (first level)[23] and Judicial Court of Honour (second level). The instituted disciplinary action shall be transferred to the Judicial Court of Honour[24] – an autonomic authority of courts to hear judicial disciplinary cases and petitions of judges for defence of the judge's honour.

The Court of Honour shall be constituted from ten members for the period of commission of the Judicial Council. Two candidates to the members of the Court of Honour shall be appointed by the President of the Republic of Lithuania, two candidates – by the Speaker of the Seimas of the Republic of Lithuania, six candidates to this Court – by the Judicial Council. The President of the Republic of Lithuania and the Speaker of the Seimas of the Republic of Lithuania shall appoint the representatives of society to the members of the Court of Honour. Decisions can be appealed to the Supreme Court of Lithuania.

In Moldova,[25] the Judicial Inspection and the Disciplinary Board operate under the authority of the Superior Council of Magistracy as independent bodies responsible for examining cases concerning the disciplinary liability of judges. *The Judicial Inspection has the mission, on the one hand, to contribute*

23 The Judicial Ethics and Discipline Commission is an institution of autonomy of courts deciding the issues of instituting disciplinary actions against judges. As it can be seen this commission is unified for both aspects – ethics and disciplinary issues.

24 Lithuanian Courts, "About Court," last modified June 10, 2020, https://www.teismai.lt/en/self-governance-of-courts/judicial-court-of-honour/about-court/664.

25 The Parliament of Republic of Moldova, The Law no. 947 of July 19, 1996 on the Superior Council of Magistracy, Monitorul Oficial, no. 15-17, January 22, 2013, https://www.legis.md/cautare/getResults?doc_id=152535&lang=ro#.

to guaranteeing judicial independence and strengthening the image of the justice system, ensuring a balance between the accountability and independence of judges, and, on the other hand, to increase public trust in the justice system.[26]

In Moldova, law No. 178/2014 on the disciplinary liability of judges, in force since 1 January 2015, represents the main legal framework applicable in this area. Since then, the law has undergone several amendments. These changes were prompted by amendments to Law No. 544 on the status of judges, recommendations of the Group of States against Corruption (GRECO),[27] opinions of the Venice Commission,[28] justice sector strategies, and national priorities aimed at increasing the objectivity, efficiency, and transparency of disciplinary procedures.[29] It strengthened the institution of the Judicial Inspection and expanded the list of criteria constituting disciplinary offences. From the perspective of judges' disciplinary liability, these amendments ensure greater clarity and predictability regarding disciplinary offences, simplify the procedure for examining such cases, and streamline the process for appealing disciplinary sanctions.

At the current stage, in order to apply even the simplest sanction provided by law – namely a 'warning' – a thorough verification and investigation carried out by the Judicial Inspection is required, followed by an examination before the Disciplinary Board.

Referrals may be based on facts that have become known either in the exercise of the rights or official duties held by the author of the complaint, or on the basis of information disseminated by the mass media. From the interpretation of the legal provision, it results that the complaint is addressed to the Superior Council of Magistracy.[30] According to the normative framework, once the complaint is registered, the Superior Council of Magistracy forwards it to the Judicial Inspection.

In the Republic of Moldova, according to current regulations, the Disciplinary Board is the first entity in disciplinary matters, and part of judicial

---

26 Natalia Creciun, "Criterii de evaluare a calității și eficienței activității inspecției judiciare," in *Contextul multidimensional actual al guvernării și drepturilor omului în Republica Moldova 2021* (Tipografia Artpoligraf, 2021), 126-157.

27 GRECO, A patra rundă de evaluare privind prevenirea corupției în ceea ce privește deputații, judecătorii și procurorii, GrecoRC4(2024)13. November 22, 2024, https://csp.md/sites/default/files/inline-files/ro_grecorc4_2024_13-final-eng-3rd_interim-republic_of_moldova-conf_0.pdf.

28 Venice Commission. Opinie comună cu privire la proiectul de lege referitor la răspunderea disciplinară a judecătorilor a Republice Moldova, CDL-AD(2014)006, March 24, 2014, https://crjm.org/wp-content/uploads/2014/03/CDL-AD2014006_RO-web.pdf.

29 Parliament of Republic of Moldova, Law no. 5.

30 Parliament of Republic of Moldova, Law no. 154, art. 4.

self-administration. However, before being examined by the Disciplinary Board, the case is processed by the Judicial Inspection. It verifies the allegations in the complaint, conducts a disciplinary investigation of the judge and, if found the disciplinary liability to be justified, sends the case to the Disciplinary Board for examination and sanctioning, as appropriate. As a result, the Judicial Inspection[31] is a 'disciplinary investigation body'. Complaints regarding acts that may constitute disciplinary misconduct of judges are examined by the inspector-judge, under the conditions established by Law No. 178/2014 on the disciplinary liability of judges, with subsequent amendments and supplements.

The Judicial Inspection consists of 7 inspectors-judges, who hold the status of public servants under Law No. 199 of July 16, 2010, on the status of persons holding high public positions. Being a specialised body of the Superior Council of Magistrates, the Judicial Inspection carries out its activities in accordance with the provisions of Law No. 947 from 19 July 1996 on the Superior Council of the Judiciary, the Law on the Disciplinary Liability of Judges No. 178 of July 25, 2014, the Law on the Judicial System No. 514 of July 6, 1995, the Law on the Status of Judges No. 544 of July 20, 1995, the Administrative Code of the Republic of Moldova No. 116 of July 19, 2018, the Regulation on the Organisation, Competence, and Functioning of the Judicial Inspection,[32] along with other normative acts. In its work, the Judicial Inspection takes into account the priorities set out in the Strategy on Ensuring the Independence and Integrity of the Justice Sector for 2022–2025 and the Action Plan, adopted by Law No. 211 of December 6, 2021, as well as the commitments assumed by the Republic of Moldova in the context of the EU accession process.

According to legal regulation,[33] the Judicial Inspection has a range of responsibilities, such as: – reviewing the organisational activities of the courts in the administration of justice; – verifying the fairness of the random allocation of cases for review in the courts; – examining citizens' petitions regarding issues of judicial ethics addressed to the Superior Council of Magistrates; – verifying complaints or, where appropriate, taking up cases on its own initiative regarding acts that may constitute disciplinary offences; – reviewing requests for the

31 Natalia Creciun, "Criterii de evaluare a calității și eficienței activității inspecției judiciare", 126-157.

32 Superior Council of Justice, The Regulation on the Organization, Competence, and Functioning of the Judicial Inspection, decision No. 120/11 with subsequent amendments, March 19, 2024, https://www.csm.md/files/Hotaririle/2025/42/571-42-Regulament.pdf.

33 Superior Council of Magistracy, Regulamentul privind normele pentru efectuarea lucrărilor de inspecţie de către Inspecţia Judiciară din 15.11.2012, Monitorul Oficial, part 1, no. 802, November 29, 2012, art. 3.

Superior Council of Magistrates to grant approval for the initiation of criminal proceedings against a judge; – examining the grounds for the President of the Republic of Moldova's rejection of the candidates proposed by the Superior Council of Magistrates for appointment of judges, and presents a report to the Superior Council of Magistrates and the person concerned.

The Judicial Inspection examines[34] citizens' petitions concerning matters related to judicial ethics and verifies complaints regarding acts that may constitute disciplinary offences. Pursuant to Article 18 of the Law on the Disciplinary Liability of Judges, the competence of the Judicial Inspection within the disciplinary procedure are exercised during the stages of preliminary verification of the complaint and the disciplinary investigation.

Table 1. Limitation periods for initiating disciplinary proceedings and competent authorities

	How long since the violation?	**Who initiates the disciplinary case?**	**First instance – title of institution (also original language) How many judges (other members?)?**	**Appeal instance – title of institution (also original language) How many judges (other members?)?**
Latvia	4 years (since 2020, before – 2 years)	City (district) court president – on judge of his/her court President of the Supreme Court (all instances) Minister of Justice (only city (district) court and regional court)	Tiesnešu disciplinārkolēģija (Judicial Disciplinary Committee) 9 judges (representing all three court instances)	Disciplinārtiesa (Disciplinary court), 6 Supreme court judges
Lithuania	3 years	Disciplinary and ethics commission (it acts as a filter for appeals),	The Judicial Ethics and Disciplinary Commission (Etikos ir drausmės komisija)	Court of Honour of Judges (Teisėjų garbės teismas). 10 members:

[34] Superior Council of Magistracy, Regulamentul privind normele pentru efectuarea lucrărilor de inspecţie de către Inspecţia Judiciară din 15.11.2012, art. 3.

	How long since the violation?	Who initiates the disciplinary case?	First instance – title of institution (also original language) How many judges (other members?)?	Appeal instance – title of institution (also original language) How many judges (other members?)?
		but the appeal to this commission may be given by: The Council of Judges, as well as the president of the court where the judge serves, or the president of any higher-level court, or any other person who has become aware of a violation	7 members: two candidates are appointed by the President of the Republic, one candidate by the Speaker of the Seimas, and four candidates by the Council of Judges	two candidates are appointed by the President of the Republic, two by the Speaker of the Seimas, and six by the Judicial Council Supreme Court of Lithuania, 3 judges
Moldova	2 years[35]	Judicial Inspection; Performance Evaluation Board (Colegiul de evaluare a performanței judecătorului); members of the Superior Council of Magistracy; the person whose rights have been violated; any person who can invoke a legitimate interest; Ministry of Justice	udicial Inspection (*Inspecția Judiciară*) – verification of the accusation and disciplinary examination. JThe composition of the Judicial Inspection (7 inspectors)	Disciplinary Board **(***Colegiul disciplinar*) = 7 persons (4 judges and 3 non-judges) – judging the disciplinary case. Supreme Court of Justice, 20 judges

[35] If a national or international court rules in a final judgement that a judge has committed a disciplinary offence, that judge may be held accountable for that offence in disciplinary proceedings within one year of the court's final judgement, but no later than 5 years from the date the infringement was committed.

5. Grounds and Frequency for Initiating Disciplinary Proceedings

It is a universally recognised principle in democratic states governed by the rule of law that disciplinary proceedings may not be initiated against a judge based on the content of a judgement rendered by that judge, as a separate mechanism – the appeals process – is provided for that purpose. At the same time, there tend to be subtle differences among various countries regarding the circumstances under which a judge faces disciplinary liability.

Table 2. The legal basis for disciplinary liability

Lithuania	1. for an action demeaning the judicial office; 2. for violation of other requirements of the Code of Ethics of the judges; 3. for non-compliance with the limitations on the work and political activities of judges provided by law.
Latvia	1. intentional violation of law during examination of a matter in court; 2. failure to perform his or her duties of employment or allowing gross negligence in the examination of a matter; 3. dishonourable actions or gross violation of the norms of the Judges Code of Ethics; 4. refusal to discontinue his or her membership in parties or political organisations; 5. failure to observe the restrictions and prohibitions provided for in the Law on Prevention of Conflict of Interest in Activities of Public Officials.
Moldova	1. failure to comply with the duty to recuse oneself when the judge knows or should have known that one of the circumstances provided for by law for recusal exists, as well as the repeated and unjustified filing of recusal motions in the same case, which results in the delay of the case's examination; 2. the intentional application in bad faith or the repeated application through gross negligence of legislation contrary to uniform judicial practice; 3. actions by a judge in the administration of justice that demonstrate serious and evident professional incompetence; 4. interference in the administration of justice by another judge;

Moldova	5. unlawful interventions or the exploitation of the position of judge in relation to other authorities, institutions, or officials, whether to resolve requests, to demand or accept the resolution of personal interests or those of others, or for the purpose of obtaining undue benefits; 6. failure to respect the secrecy of deliberations or the confidentiality of proceedings of that nature, as well as other confidential information that has come to the judge's knowledge in the exercise of their duties, in accordance with the law; 7. violation, for reasons attributable to the judge, of the deadlines for performing procedural actions, including the deadlines for drafting judicial decisions and transmitting copies thereof to the parties to the proceedings; 8. unjustified absences from work, tardiness, or leaving work without objective reasons, if this has affected the court's operations; 9. violation of mandatory legal provisions in the administration of justice; failure to fulfil or delayed fulfilment, attributable to the judge, of a work obligation; 10. unprofessional conduct in the administration of justice toward colleagues, attorneys, experts, witnesses, or other persons; 11. violation of provisions regarding incompatibilities, prohibitions, and service restrictions applicable to judges; 12. committing an act constituting the elements of a crime or misdemeanour, if this has damaged the prestige of the judiciary; 13. obstructing, by any means, the work of judicial inspectors; 14. using inappropriate language in judicial decisions or providing reasoning that is manifestly contrary to legal logic, such as to undermine the prestige of the judiciary or the dignity of the office of judge; 15. other acts that undermine professional honour or integrity or the prestige of the judiciary, committed in the course of official duties or outside of them.

The level of detail with which violations, sanctions, and decision-making mechanisms and criteria are set forth in legislation is, in a sense, indicative of whether the legal culture is dominated by legal positivism or the natural law school. Legal positivism can signify strict reliance on the authoritative power of the law, which is regarded as the most objective arbiter in contentious situations. Conversely, in societies characterised by trust in the state and in fellow citizens, there is logically no need or rational basis to formulate laws

in excessive detail, relying instead on the common sense of decision-makers and their understanding of justice: *the 'quantity' of law varies with the quantity of stratification and culture in a society*.[36]

The fact that the public has the right to lodge complaints and claims regarding judicial operations serves as a vital instrument for ensuring judicial transparency. Concurrently, it allows the judicial system to gauge the 'general sentiment' from the perspective of court users, clarifying the specific systemic issues being contested. *Court presidents, who possess the authority to initiate disciplinary proceedings, acknowledge that incoming complaints constitute their primary source of information. Consequently, the attitude and subsequent actions of these officials upon receiving such complaints are of paramount importance*.[37]

Among the three countries examined, Lithuania and Moldova centrally analyse this mechanism of public complaints against the judicial system. In Latvia, there is no established practice whereby court chairpersons or the Minister of Justice systematically aggregate received complaints. On the contrary, complainants frequently submit grievances to multiple addressees simultaneously, in the hope that at least one authority will consider and act upon the arguments presented. Although there has been scepticism or caution in Latvian public opinion regarding the executive branch's (the Minister of Justice's) authority to initiate disciplinary proceedings against a judge, overall statistics show that this mechanism has in no way jeopardised the independence of the judiciary, as the Minister's motions to initiate disciplinary proceedings have, for the most part, resulted in disciplinary sanctions; consequently, it can be concluded that this instrument has functioned appropriately, and no political interference in the initiation of disciplinary proceedings has been observed.

In a state governed by the rule of law, there is no basis for presuming that a minister will blindly comply with a citizen's categorical request to initiate disciplinary proceedings against a judge. The minister retains the discretion to initiate or not initiate disciplinary proceedings by referring the matter to the Disciplinary Commission. In 2025, the Supreme Court of Latvia emphasised that the Minister of Justice has been granted the authority to consider whether it is necessary to initiate disciplinary proceedings against a specific judge. The law does not guarantee the petitioner the right to receive a substantive response to

[36] Dace Šulmane, "'Legislative Inflation' – An Analysis of the Phenomenon in Contemporary Legal Discourse," *Baltic Journal of Law & Politics* 4, no. 2 (2011): 85.

[37] Valts Kalniņš, Iveta Kažoka and Gatis Litvins, "Tiesnešu ētika, kvalifikācija un atbildība Latvijā: kā neapstāties pie sasniegtā? Pētījuma ziņojums," (Sabiedriskās politikas centrs Providus, 2008), 61, https://providus.lv/article_files/1903/original/Zinojums_FINAL.pdf?1339440792.

the submitted petition that is exactly what they want or have imagined. In such a situation, the petitioner essentially has the right to receive a response only regarding how the Minister of Justice has assessed the information received and what he has consequently decided to do with it, rather than a detailed explanation of why the Minister of Justice sees grounds to exercise or not exercise the authority granted to him to initiate disciplinary proceedings against a specific judge. No legal provision provides that private individuals have the right to request that the Minister of Justice decide on the initiation of disciplinary proceedings against a specific judge.[38]

Despite the fact that a relatively large number of complaints are received in all countries (Latvia, Lithuania, Moldova) regarding the work of the courts or specific judges, only a small percentage of these complaints result in a hearing before a disciplinary commission, which already implies that an initial review of the complaint's compliance has taken place.

Furthermore, even in cases where a disciplinary commission reviews a complaint, in some instances across all the countries examined in this article, the matter is limited to that review. This does not necessarily mean that disciplinary commissions are lenient or 'turn a blind eye' to judges' violations. The very fact of the case being examined implies that grounds have been found to collectively and scrupulously delve into the substance of the alleged violation. The majority of the complaints received to initiate disciplinary proceedings against judges consist of motions raising procedural issues, disagreeing with procedural decisions made by judges, as well as submissions that did not meet the – unreasoned or have other deficiencies (submitted repeatedly, not properly signed, written in a non-official language, etc.). If a disciplinary violation is not found, it means that the judge's conduct did not meet any of the grounds listed in the law.

There are various institutions in Europe that compile statistics on the work of the courts. Although the number of such compilations has increased over time, it is generally evident that easily comparable information is no longer available in certain statistical categories. The latest CEPEJ study on disciplinary cases involving judges is available for 2012 (2012 edition (2010 data) – CEPEJ Studies No. 18, which today provides a reflection of historical trends within the context of legal culture:

[38] Supreme Court of Latvia. Latvijas Republikas Senāta Administratīvo lietu departamenta. No. 680019625, SKA-684/2025. August 15, 2025.

Table 3. Distribution of disciplinary proceedings initiated against judges in 2012 (Q144)

Country	Total Cases	Breach of Ethics	Professional Inadequacy	Criminal Offence	Other
Latvia	11	1 *(9.1%)*	7 *(63.6%)*	0 *(0%)*	3 *(27.3%)*
Lithuania	60	18 *(30.0%)*	42 *(70.0%)*	NA	0 *(0%)*
Republic of Moldova	52	52 *(100.0%)*	0 *(0%)*	0 *(0%)*	0 *(0%)*

Lithuania and Latvia in 2012 showed a close structural alignment, leaning heavily toward professional inadequacy (63.6% for Latvia and 70.0% for Lithuania). In both countries, the majority of cases involve professionals failing to meet performance or capability standards rather than breaking ethical boundaries.

However, Lithuania records over 5x the volume of cases (60) compared to Latvia (11). This could point to stricter reporting mandates or a larger baseline population of registered professionals in Lithuania's dataset.

The fact that the number of initiated disciplinary cases in Lithuania and Moldova in 2012 was similar suggests that the understanding of the need for internal systemic alignment and the rigour of the resulting actions can proceed with equal stringency, regardless of a country's official status as an EU member state.

The analysis of data regarding the disciplinary accountability of judges in Moldova over the past two years shows a declining trend. Additionally, the majority of dismissed complaints involved the disagreement of the complainant with court decisions or with the actions of judges during judicial proceedings. For example, of the total number of dismissal decisions in 2024, 229 were appealed to the Boards for the Examination of Appeals, which upheld 2 appeals and remitted the cases to the Judicial Inspection for further review. In 2025, the Boards for the Examination of Appeals reviewed 117 appeals. In 2024, the Disciplinary Board did not impose any sanctions in disciplinary cases against judges. In 2025, the Disciplinary Board examined 25 reports, reviewed 117 appeals, and applied 9 sanctions, including 4 warnings, 3 reprimands, and 2 dismissals from office.

In Latvia, during the 2024 calendar year, the Judicial Disciplinary Committee registered a total of five disciplinary cases. The allocation of these proceedings indicates that three cases involved judges of first-instance courts, while two

cases were directed against regional court judges. The institutional origin of these disciplinary actions reflects varying degrees of oversight activity across the judiciary and executive branches. The Judicial Ethics Commission initiated the majority of the proceedings, accounting for three cases. The remaining two actions were split equally between the Chief Justice of the Supreme Court and the Minister of Justice, each initiating one case.

The disciplinary measures and decisions rendered by the Disciplinary Committee of Latvia in 2025 reflect a graduated approach to judicial accountability, ranging from exoneration to the ultimate sanction of removal: Issued in two cases as a formal disciplinary sanction. One case was terminated on the grounds that the Committee found insufficient evidence of either an intentional violation of the law or gross negligence. In one instance, the Committee limited its intervention to a formal hearing of the matter, electing not to impose a substantive disciplinary penalty. One judge received a salary reduction of 20% for a duration of six months. In one severe case, the Committee recommended the dismissal of the judge from their judicial post.

Out of the decisions rendered in 2025, a single judgement was appealed to the Disciplinary Court. Furthermore, alongside its formal case docket, the Committee processed 40 submissions and complaints received from various individuals and institutional bodies during the same calendar year.

The Commission in Lithuania initiated sixteen disciplinary proceedings during the 2020–2025 period. During the same period, ten cases were limited to consideration (no disciplinary proceedings were initiated) (2020 – two, 2021 – three, 2022 – two, 2023 – two, 2024 – one, 2025 – none). It should also be noted that the decisions adopted by the Commission are not subject to appeal. Nevertheless, the number of submissions (appeals) is not so small. Each year, there are approximately 200 submissions, statements, requests, complaints, and other documents received.[39] Between 2020 and 2026, the Court of Honour in Lithuania imposed 12 disciplinary sanctions:

- issued a warning six times;
- issued a reprimand twice;
- three severe reprimands;
- one recommendation to the President of the Republic of Lithuania to remove a judge from office.

[39] *Teisėjų etikos ir drausmės komisijos veiklos ataskaita*, Lietuos Teismas, 2024, https://www.teismai.lt/data/public/uploads/2025/03/d1_tedk-ataskaita-7.pdf.

During the same period, the Supreme Court of Lithuania reviewed 4 cases.

As the scope of public discourse in today's world has expanded, the transparency of public administration has also increased significantly. Decisions affecting the public have become easily accessible, remote, and analysable using big data.

Public scrutiny of institutional transparency and accountability for the quality of work has also naturally increased. In fact, every judicial disciplinary case has the potential to receive varying degrees of publicity, which remains on the internet for an indefinite period of time for public scrutiny.

Thus, the realisation sinks into the subconscious of every professional that a negative history actually affects the level of trust not only in a specific judge, but is objectively associated with the entire judicial system.

6. Conclusions

In general, the disciplinary liability of judges in Latvia, Lithuania (EU Member States since 2004), and Moldova (an EU candidate country) is governed by similar principles, which indicates significant progress in the implementation of European standards in Moldova. In addition to the judiciary itself, the Minister of Justice also has the right (with exceptions) to initiate disciplinary proceedings. Disciplinary liability for former judges is not standard practice in EU Member States; consequently, upon leaving office, a person in Latvia and Lithuania could no longer be held subject to judicial disciplinary liability, as sanctions would lack meaning (e.g., a reprimand or salary reduction).

In a system where the entire judiciary has required a vetting process to restore public confidence in the judiciary, exceptions and special adjustments are permissible even in cases where judges have lost their positions as a result of a 'purge' of the system, but this should not be considered the standard model for a democratic state. The fact that a very large proportion of complaints about a judge's work do not result in a disciplinary case with an appropriate sanction does not indicate that these complaints are unnecessary or that their number should be reduced. On the contrary, complaints can simultaneously highlight other shortcomings in the judicial system and still serve as a barometer of public sentiment and assessment of the judiciary.

Given that disciplinary bodies in the countries examined in this article operate on multiple levels (two instances in Latvia, three in Lithuania and Moldova), this ensures respect for a judge's rights and the opportunity to demonstrate that

their conduct meets the high standards expected of a judge. Lithuania has an original model in which a single commission deals with issues that are similar in nature but distinct: ethics and disciplinary liability. To ensure efficiency and conserve human resources, such a model is worthy of support.

The disciplinary liability of judges must be understood within the broader context of the reforms undertaken in the Republic of Moldova and the commitments assumed as an EU candidate state.

References

Legal regulations

Council of Europe. Opinion No. 27 on the Disciplinary Liability of Judges. December 4-6, 2024.

Council of Europe. Recommendation of the Committee of Ministers to Member States on the Independence, Efficiency and Role of Judge. No. R (94) 12. October 13, 1994. https://search.coe.int/cm?i=09000016804c84e2.

Council of Europe. Recommendation of the Committee of Ministers to Member States on Judges: Independence, Efficiency and Responsibilities. No. CM/rec (2010) 12. November 17, 2019. https://search.coe.int/cm#{%22CoEIdentifier%22:[%2209000016805afb78%22],%22sort%22:[%22CoEValidationDate%20Descending%22]}.

European Commission. Communication From the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. 2025 Rule of Law Report. COM(2025) 900 final. July 8, 2025.

European Parliament. Article 47 of the Charter of Fundamental Rights of the European Union. Official Journal of the European Communities. No. 2000/C 364/01. December 18, 2000. https://www.europarl.europa.eu/charter/pdf/text_en.pdf.

European Union. Consolidated Versions of the Treaty on European Union: Article 19. Official Journal of the European Union. No. C202/27. July 7, 2016. https://eur-lex.europa.eu/eli/treaty/teu_2016/art_19/oj/eng.

GRECO. A patra rundă de evaluare prevenirea corupției în ceea ce privește deputații, judecătorii și procurorii: al treilea raport intermediar de conformitate. Republica Moldova. GrecoRC4(2024)13. November 22, 2024. https://csp.md/sites/default/files/inline-files/ro_grecorc4_2024_13-final-eng-3rd_interim-republic_of_moldova-conf_0.pdf.

Organisation of Judiciary of the Republic of Moldova. The Law No. 514-XIII. July 16, 1995. https://www.ecoi.net/en/file/local/1271650/1930_1318180593_law-on-the-organization-of-judiciary-1995.pdf.

The Parliament of the Republic of Latvia. Judicial Disciplinary Liability. November 24, 1994. https://likumi.lv/ta/en/en/id/57677-judicial-disciplinary-liability-law.

The Parliament of Republic of Moldova. Law No. 5 of February 2, 2023 to Amend Some Normative Acts (Disciplinary Liability of Judges and the Work of the Judical Inspection). Monitorul Oficial. No. 53-56 art. 92. February 18, 2023. https://www.legis.md/cautare/getResults?doc_id=135622&lang=ro.

The Parliament of Republic of Moldova. The Law no. 65 of March 30, 2023 on the External Evaluation of Judges and Candidates for the Position of Judge of the Supreme of Justice. Monitorul Oficial. No. 117-118. April 6, 2023. https://www.legis.md/cautare/getResults?doc_id=140455&lang=ru.

The Parliament of Republic of Moldova. The Law no. 154 of July 5, 2012 on Superior Council of Magistrates.Monitorul Oficial. No. 190-192. September 14, 2012. https://www.legis.md/cautare/getResults?doc_id=106368&lang=ro.

The Parliament of Republic of Moldova. The Law no. 252 of August 17, 2023 on the External Evaluation of Judges and Prosecutors and Amendments of Some Regulatory Acts. Monitorul Oficial. No. 325-327. August 22, 2023. https://www.legis.md/cautare/getResults?doc_id=145198&lang=ro.

The Parliament of Republic of Moldova. The Law no. 947 of July 19, 1996 on the Superior Council of Magistracy. Monitorul Oficial. No. 15-17, January 22, 2013. https://www.legis.md/cautare/getResults?doc_id=152535&lang=ro.

The Parliament of Republic of Moldova. The Strategy on Ensuring the Independence and Integrity of the Justice Sector for 2022–2025 and the Action Plan for its Implementation. Monitorul Oficial. No. 325-333. December 31, 2021. https://www.legis.md/cautare/getResults?doc_id=129241&lang=ro.

Superior Council of Justice. The Regulation on the Organization, Competence, and Functioning of the Judicial Inspection. Decision No. 120/11 with subsequent amendments. March 19, 2024. https://www.csm.md/files/Hotaririle/2025/42/571-42-Regulament.pdf.

Superior Council of Magistracy. Regulamentul privind normele pentru efectuarea lucrărilor de inspecţie de către Inspecţia Judiciară din 15.11.2012. Monitorul Oficial. Part 1, no. 802, November 29, 2012.

Venice Commission. Opinie comună cu privire la proiectul de lege referitor la răspunderea disciplinară a judecătorilor a Republicc Moldova. CDL-AD(2014)006. March 24, 2014. https://crjm.org/wp-content/uploads/2014/03/CDL-AD2014006_RO-web.pdf.

Specialised literature

Bachmaier, Lorena. "Disciplinary Sanctions Against Judges: Punitive but not Criminal for the Strasbourg Court." *Eucrim* 17, no. 4 (2022): 260–265. https://doi.org/10.30709/eucrim-2022-018.

Ciobanu, Rodica, and Valria Ursu. "External Judicial Vetting: The Axis of Safety for the Republic of Moldovas Accession to the European Union." In *CEEeGov'25: Proceedings of the Central and Eastern European eDem and eGov Days 2025*. Association for Computing Machinery, 2026. https://doi.org/10.1145/3773002.3773014.

Ciobanu, Rodica. "Criza de integritate și provocările justiției de tranziție." In *Statul, securitatea şi drepturile omului în era digital = State, Security and Human Rights in Digital Age: conferinţă ştiinţifico-practică internaţională, Chișinău, 12-13 decembrie 2024*. Lexon Prim, 2025. https://doi.org/10.59295/ssdoed2025.03.

Consiliul Superior al Magistraturii Inspecția Judiciară. *Raport anual de activitate*. 2024. https://www.csm.md/files/RAPOARTE/2024/RAPORT-IJ-2024.pdf.

Consiliul Superior al Magistraturii Inspecția Judiciară. *Raport anual de activitate*. 2025. https://www.csm.md/files/RAPOARTE/2025/RAPORTIJ2025final.pdf.

Council of Europe. "Strengthening disciplinary liability of judges while safeguarding their independence." December 13, 2024. https://www.coe.int/en/web/portal/-/renforcer-la-responsabilit%C3%A9-disciplinaire-des-juges-tout-en-prot%C3%A9geant-leur-ind%C3%A9pendance.

Creciun, Natalia. "Criterii de evaluare a calității și eficienței activității inspecției judiciare." In *Contextul multidimensional actual al guvernării și drepturilor omului în Republica Moldova 2021*. Tipografia Artpoligraf, 2021.

General Assembly of European Network of Councils for the Judiciary. Declaration of Paris 2026 'Trust in the Judiciary'. June 5, 2026. https://pgwrk-websitemedia.s3.eu-west-1.amazonaws.com/production/pwk-web-encj2017-p/Adopted%20Declaration%20of%20Paris%20'Trust%20in%20the%20Judiciary'.pdf.

Kalniņš, Valts, Iveta Kažoka, and Gatis Litvins. "Tiesnešu ētika, kvalifikācija un atbildība Latvijā: kā neapstāties pie sasniegtā? Pētījuma ziņojums." *Sabiedriskās politikas centrs Providus*, 2008. https://providus.lv/article_files/1903/original/Zinojums_FINAL.pdf?1339440792.

Lithuanian Courts. "About Commission." Last modified June 10, 2020. https://www.teismai.lt/en/self-governance-of-courts/judicial-ethics-and-discipline-commission/about-commission/667.

Lithuanian Courts. "About Court." Last modified June 10, 2020. https://www.teismai.lt/en/self-governance-of-courts/judicial-court-of-honour/about-court/664.

Nivelul de implementare a strategiei privind asigurarea independenței și integrității sectorului justiției pentru anii 2022–2025. Transparency international Moldova, 2024. https://www.old.transparency.md/2024/07/22/nivelul-de-implementare-a-strategiei-privind-asigurarea-independentei-si-integritatii-sectorului-jusitiei-pentru-anii-2022-2025/.

Teisėjų etikos ir drausmės komisijos veiklos ataskaita. Lietuos Teismas, 2024. https://www.teismai.lt/data/public/uploads/2025/03/d1_tedk-ataskaita-7.pdf.

Šulmane, Dace. "'Legislative Inflation' – An Analysis of the Phenomenon in Contemporary Legal Discourse." *Baltic Journal of Law & Politics* 4, no. 2 (2011): 78–101.

Court practices

Court of Justice of the European Union. European Commission v Republic of Poland. Case C-791/19. July 15, 2021.

Court of Justice of the European Union. Repubblika v Il-Prim Ministru. Case C-896/19. April 20, 2021.

Court of Justice of the European Union. A.B. and Others v. Krajowa Rada Sądownictwa. C-824/18. March 2, 2021.

European Court of Human Rights. Case of Ramos Nunes de Carvalho e Sá v. Portugal. Applications nos. 55391/13, 57728/13 and 74041/13. November 6, 2018.

European Court of Human Rights. Case of Eminağaoğlu v. Turkey. Application no. 76521/12. March 9, 2021.

Judicial Court of Honour of the Republic of Lithuania. Decision no. 21P-2. October 13, 2025, https://www.teismai.lt/data/public/uploads/2025/12/tgt-sprendimas-teisejo-a.-purvainio-drausmes-byloje_nuasmenintas.pdf.

Supreme Court of Latvia. Latvijas Republikas Senāta Administratīvo lietu departamenta. No. 680019625, SKA-684/2025. August 15, 2025.

Abstract

Disciplinary Responsibility of Judges for Breaches of Ethics – Three Countries Perspective in Light of European Standards

This article explores the practical implementation of judicial disciplinary liability standards in Latvia, Lithuania, and Moldova, three jurisdictions navigating the complexities of post-Soviet legal transformation and European integration.

Through a comparative lens, the study examines three critical pillars of the disciplinary process.

First, it analyses the mandates of initiators and judicial disciplinary institutions, arguing that the composition and scope of authority of these bodies are decisive factors in ensuring judicial independence and preventing political interference. Finally, the article provides This article provides an overview of how society and individual citizens can engage with the judicial system and use complaint and participation mechanisms to ensure its transparency, as well as how this process plays out in practice in three legal systems.

By synthesising legislative frameworks with empirical case data, the study identifies best practices and remaining challenges in fostering a culture of judicial integrity across the Baltic and Central European regions.

Keywords: judicial liability, disciplinary proceedings, transparency, judicial independence, trust in judiciary

Santrauka

Teisėjų drausminė atsakomybė už etikos pažeidimus – trijų šalių perspektyva Europos standartų kontekste

Straipsnyje nagrinėjamas teisėjų drausminės atsakomybės standartų praktinis įgyvendinimas Latvijoje, Lietuvoje ir Moldovoje – trijose jurisdikcijose, susiduriančiose su sudėtingais posovietinės teisinės transformacijos ir Europos integracijos iššūkiais. Taikant lyginamąjį požiūrį, tyrime nagrinėjami trys pagrindiniai drausminio proceso ramsčiai.

Pirma, analizuojami iniciatorių ir teisminių drausminių institucijų įgaliojimai, teigiant, kad šių institucijų sudėtis ir įgaliojimų apimtis yra lemiamais veiksniais užtikrinant teismų nepriklausomybę ir užkertant kelią politiniam kišimuisi. Galiausiai straipsnyje pateikiama apžvalga, kaip visuomenė ir pavieniai piliečiai gali bendradarbiauti su teismų sistema bei naudotis skundų ir dalyvavimo mechanizmais siekdami užtikrinti jos skaidrumą, taip pat kaip šis procesas vyksta praktikoje trijose teisinėse sistemose.

Sujungdamas teisinę analizę su empiriniais bylų duomenimis, tyrimas nustato geriausią praktiką ir likusius iššūkius skatinant teisminio sąžiningumo kultūrą Baltijos ir Vidurio Europos regionuose.

Pagrindiniai žodžiai: teisėjų atsakomybė, drausminės procedūros, skaidrumas, teismų nepriklausomumas, pasitikėjimas teismų sistema

The Intersections of Criminal, Administrative and Civil Law:
International and National Contexts, pp. 251–276
https://doi.org/10.12797/9788383685328.11

Gabrielė Juodkaitė-Granskienė
Vilnius University, Faculty of Law
gabriele.juodkaite-granskiene@tf.vu.lt

Andrej Gorbatkov
Vilnius University, Faculty of Law
andrejus.gorbatkovas@tf.vu.lt

Forensic Expertise, Liability, and Insurance: Between Efficiency and Fairness in European and Lithuanian Legal Systems

1. Introduction

Forensic experts provide valuable services to the legal system by conducting expert examinations and testifying, helping attorneys defend their clients' interests, and enabling courts to establish the truth in a case. However, forensic experts must provide objective, comprehensive, competent, and fact-based analysis and testimony, and must also comply (if applicable) with their contractual obligations. Every appointment of an expert creates a duty to act with due care, and any failure to meet reasonable standards of care that results in harm to a lawyer or client may form the basis for a negligence claim or a civil lawsuit against the expert. Professional liability insurance is specifically designed to protect forensic experts from negligence claims and should be a core component of any forensic expert's insurance and risk management programme.

Although the topic of civil insurance for expert activities and their results is highly relevant and problematic, it has not yet been addressed in the legal doctrine. The authors of this scholarly publication have jointly analysed a considerable number of classic and complex issues in forensic expertise that

require effective solutions.[1] Insurance for expert activities is another challenge we will seek to overcome.

2. Forensic Experts and the Dual Nature of Legal Responsibility

Forensic experts occupy a unique position in legal systems. They are neither purely private professionals nor fully integrated judicial actors. Their function is epistemic:[2] they produce and interpret knowledge that becomes embedded in judicial reasoning. This dual nature creates a corresponding duality in responsibility:

- Private responsibility, grounded in tort and contract law,
- Public responsibility, grounded in fair trial guarantees (Article 6 European Convention on Human Rights[3] (ECHR).

The European Court of Human Rights (ECtHR) has made clear that expert evidence can determine the outcome of proceedings and must therefore be subject

---

1 For example, Gabrielė Juodkaitė-Granskienė and Andrej Gorbatkov, "Forensic Examinations in Lithuania: 30 Years of Experience (1990–2020)," in *Legal Developments During 30 Years of Lithuanian Independence: Overview of Legal Accomplishments and Challenges in Lithuania*, ed. Gintaras Švedas, Donatas Murauskas (Springer International Publishing, 2021), 181-204, https://doi.org/10.1007/978-3-030-54783-7_10; Andrej Gorbatkov and Gabrielė Juodkaitė-Granskienė, "Baudžiamieji procesiniai kompleksinių ir komisijinių ekspertizių reglamentavimo ypatumai," in *Lietuvos Respublikos baudžiamojo proceso kodeksui – 10 metų: recenzuotų mokslinių straipsnių, skirtų Lietuvos ir užsienio šalių baudžiamojo proceso, baudžiamosios teisės ir kriminalistikos aktualijoms ir problematikai, rinkinys*, ed. Gabrielė Juodkaitė-Granskienė, Andrej Gorbatkov, Remigijus Merkevičius (Lietuvos teismo ekspertizės centras, 2012), 272-295; Gabrielė Juodkaitė-Granskienė and Andrej Gorbatkov, "Міжнародне співробітництво в галузі криміналістики та судових наук. Роль громадських об'єднань у розвитку криміналістики та судових наук [The Sydney declaration – something new or something old forgotten?]," in *Нове століття криміналістики та судових наук: Liber Amicorum на честь академіка В. Ю. Шепітька: монографія [New Century of Criminalistics and Forensic Sciences: Liber Amicorum in Honour of Academician Valery Shepitko: monograph]*, ed. Mykhaylo Shepitko (Pravo, 2026), 711-725.

2 *Epistemic* relates to knowledge itself (e.g., 'epistemic authority' means having expert knowledge on a subject). *Epistemic* traces back to the knowledge of the Greeks. It comes from *epistēmē*, Greek for 'knowledge'. That Greek word is from the verb *epistanai*, meaning 'to know or understand', a word formed from the prefix *epi-* (meaning 'upon' or 'attached to') and *histanai* (meaning 'to cause to stand'). The study of the nature and grounds of knowledge is called *epistemology*, and one who engages in such study is an epistemologist. ('Epistemic', Merriam-Webster.com Dictionary, accessed May 25, 2026, https://www.merriam-webster.com/dictionary/epistemic.)

3 European Court of Human Right, Council of Europe, European Convention on Human Rights, October 2, 2013, https://www.echr.coe.int/documents/d/echr/convention_ENG.

to adversarial scrutiny (e.g., *Bönisch v. Austria*[4], *Stoimenov v. North Macedonia*5). These cases demonstrate that failures[6] in forensic expertise are not merely private wrongs but can undermine the legitimacy of judicial outcomes. Yet the legal system still primarily treats expert liability as an ordinary matter of negligence. This mismatch between function and doctrine lies at the heart of the problem.

More interest in insurance issues of forensic activities was taken mostly after the publication of Guidelines on the role of court-appointed experts in judicial proceedings of Council of Europe's Member States,[7] issued by European Commission for the Efficiency of Justice (CEPEJ). Paragraph 7.2.3 of said guidelines refer to Damage claims in cases of culpably, incorrect factual assessment and such situation is defined as:

> *130. In some specific cases in which the expert has culpably failed to conduct a proper and correct assessment, the parties may have damage claims against the expert.*
>
> *131. In these cases it will usually be necessary that the expert has prepared his expert opinion wrongly with intent or willful negligence. For the degree of fault, the assessment itself will count.*
>
> *132. The damage claims against the expert can be settled in a separate procedure. Notwithstanding that, the parties can also bring normal legal proceedings against the expert.*
>
> Paragraph 7.2.4, named 'The expert's duty to insure against damage caused' states that:
>
> *133. To be able to enforce possible damage claims of the parties, it might make sense to place a duty on the expert to be insured for any case of liability (liability insurance).*

The grammatical formulation of said paragraph means that it only propose for national state institution to analyse the necessity for special insurance for forensic

4 European Court of Human Rights, case of Bönisch v. Austria, application no. 8658/79, May 6, 1985.

5 European Court of Human Rights, case of Stoimenov v. the Former Yugoslav Republic of Macedonia, application no. 17995/02, April 5, 2007.

6 In our view, an expert error is honest, unintentional, and non-criminal conduct on the part of an expert. For more information, see: Gabrielė Juodkaitė-Granskienė and Andrej Gorbatkov, "Klaidos problema teismo ekspertizėje," in *Lietuvos Respublikos baudžiamojo proceso kodeksui – 10 metų: recenzuotų mokslinių straipsnių, skirtų Lietuvos ir užsienio šalių baudžiamojo proceso, baudžiamosios teisės ir kriminalistikos aktualijoms ir problematikai, rinkinys,* ed. Gabrielė Juodkaitė-Granskienė, Andrej Gorbatkov, Remigijus Merkevičius (Lietuvos teismo ekspertizės centras, 2012), 335-346.

7 European Commission for the Efficiency of Justice, Guidelines on the Role of Court-Appointed Experts in Judicial Proceedings of Council of Europe's Member States (Document adopted by CEPEJ at its 24th Plenary meeting, 11–12 December 2014, https://rm.coe.int/168074827a.

activities. Therefore, before making the decision about these issues several aspects should be analysed. First of all the European insurance and reinsurance federation recommends to evaluate the necessity for such liability insurance taking into account that compulsory insurance schemes will only work if specific conditions are met.[8] If they are not, an inappropriate scheme can do more harm than good. What are the conditions? There are only limited situations in which compulsory insurance can be appropriate because the following basic conditions — at the very least — must be met:

- Sufficient data for insurers to assess the expected frequency and size of claims, so that they can price policies correctly.
- Sufficient similarity in the risks being covered. If risks are very different, complex or not well known, insurers instead need to have the flexibility to tailor their underwriting to specific risks.
- A variety of insurers interested in offering cover, so that there is sufficient insurance capacity and adequate competition.
- Enough reinsurance capacity to allow risks to be sufficiently spread, particularly large and long-term ones.

There are, of course, other preconditions that must be met before a risk can even be insurable. One of the most basic is that the insured event must be beyond the insured's control.[9]

What if the conditions are not met? Inappropriate compulsory schemes are very likely to be counterproductive – actually making life more difficult for individuals, businesses and insurers.

Effects on the insurance market:

1. A lack of underwriting/contractual freedom stifles insurance product innovation and insurance market growth.
2. There is insufficient or no insurance, as insurers are unwilling to offer cover under the restrictions imposed by a compulsory scheme.
3. There is less loss prevention/increased moral hazard because policyholders who have been obliged to purchase insurance do not implement adequate protection measures or behave in a riskier manner, as they feel the burden is on the insurer.

8 "Liability issues," Insurance Europe, accessed May 26, 2026, https://www.insuranceeurope.eu/priorities/22/liability-issues.

9 "Insight Briefing: Compulsory Insurance: When It Works and When It Doesn't," Insurance Europe, 2017, https://www.insuranceeurope.eu/mediaitem/36cdb96f-a7c2-46a7-a4db-882d05869c41/Compulsory%20insurance%20Insight%20Briefing.pdf.

Effects on individuals and businesses:

1. Individuals are unprotected or businesses are unable to operate or grow because they cannot obtain the cover that they need by law, as insurers are unwilling to offer cover.
2. There are higher premiums due to:
   - the uncertainty created by the lack of data on which insurers can base underwriting judgements;
   - lack of a competitive market;
   - additional administrative costs for insurers created by compulsory schemes.
3. Individuals/businesses could be required to purchase more cover than they need, while others could be under-insured due to inflexibility in distinguishing between risk levels.[10]

In most states the insurance is divided into compulsory and not compulsory (optional). An analysis of compulsory foreign insurance shows that transport third party liability and occupational accident insurance are the most common (the latter operating in some countries as part of state social insurance and in others by private insurance companies). Other types of compulsory insurance differ a lot: most frequent is professional indemnity insurance for certain professions (lawyers, notaries, architects, insurance brokers, tour operators), air or ship transport liability insurance, less common –for hunters, shooting games, pharmaceutical manufacturers and pharmacies, dogs owners compulsory insurance, pension schemes and fund managers. Compulsory property, life or health insurance is quite rare, as the contracts of this insurance primarily protect the property interests of the policyholder, and how to protect their interests is decided by the policyholder himself.

Compulsory insurance is usually governed by insurance law, but sometimes compulsory insurance and its terms may be set by professional organisations in accordance with the law or their internal codes, which apply only to members of the organisation. EU countries often have separate legislation governing compulsory insurance (Netherlands, Bulgaria). In Hungary, some prohibitions are laid down only in the Insurance Act (23 prohibitions) and others (24 prohibitions) in other laws. In the United Kingdom, compulsory insurance is classified according to its regulatory framework: regulated by law, local authority, professional (statutory) organisations (veterinarians, architects) or as a condition of trade union membership (actuaries, auditors, engineers).

10 "Insight Briefing," Insurance Europe.

Below are some rules relating to the liability and insurance of experts in certain European countries (see *Table 1*).

Table 1. Rules relating to the liability and insurance of experts[11]

State	Rules related to liability of an expert	Insurance
Belgium[12]	The liability of legal experts is engaged according to the general rules (civil / contractual law). The liability of the expert is not capped by law.	Not determined by law (not obligatory).
Czech Republic[13]	Experts are liable under the Experts Act for offences committed by them (Section 39) or for the possible commission of the criminal offence of perjury and false expert opinion, if the expert's report was false, grossly distorted or incomplete (Section 346 of Act No 40/2009, the Criminal Code).	The Experts Act also provides for special liability of experts under private law. Experts are required to provide compensation for any damage they cause in connection with their expert work. However, experts are relieved of liability if they prove that they could not have prevented the damage even when making all efforts that could be required of them. Experts' liability is not subject to a cap specified by law. The expert's compulsory insurance contributes to covering their liability for damage caused by the performance of their expert work.

11 The table is compiled by the authors using the online portal 'Find an Expert', e-justice.europa.eu, last modified November 17, 2021, https://e-justice.europa.eu/topics/find-legal-professional/find-expert_en.

12 Liability and Insurance for Experts in Belgium, https://e-justice.europa.eu/topics/find-legal-professional/find-expert/be_en#iii-liability-of-court-experts.

13 "Liability of Experts: Czech Republic," e-justice.europa.eu, last updated September 8, 2023, https://e-justice.europa.eu/topics/find-legal-professional/find-expert/cz_en#iv-liability-of-experts.

State	Rules related to liability of an expert	Insurance
Denmark[14]	There is no specific rule applicable to the liability of experts. The expert must respect the professional rules which regulate his specialty, impartiality and professional secrecy. Their liability is thus governed by general tort/contractual rules. Such rules do not provide any cap for liability.	There is no obligation to cover their possible liability via professional liability insurance.
Estonia[15]	Experts are held liable according to the general contract and tort law. In addition, there is a particular criminal law provision dealing with the expert's liability: False accusation: (1) Submission of knowingly false accusations concerning commission of a criminal offence by another person is punishable by a pecuniary punishment or up to one year's imprisonment. (2) The same act, if it involves fraudulent creation of evidence, is punishable by a pecuniary punishment or up to five years' imprisonment.	There is no obligation for experts to cover their liability via professional indemnity insurance.
Greece[16]	Experts are held liable according to the general contract and tort law.	There is no obligation for experts to cover their liability via professional indemnity insurance.

14 "Liability of Experts: Denmark," e-justice.europa.eu, last updated May 9, 2022, https://e-justice.europa.eu/topics/find-legal-professional/find-expert/dk_en#iv-liability-of-experts.

15 "Liability of Experts: Estonia," e-justice.europa.eu, last updated April 10, 2020, https://e-justice.europa.eu/topics/find-legal-professional/find-expert/ee_en#iv-liability-of-experts.

16 "Liability of Experts: Greece," e-justice.europa.eu, last updated June 14, 2024, https://e-justice.europa.eu/topics/find-legal-professional/find-expert/el_en#iv-liability-of-experts.

State	Rules related to liability of an expert	Insurance
France[17]		The expert is obliged to cover possible liability via professional indemnity insurance. The insurance covers the civil and professional liability of the expert including missions in other Member States of the European Union.
Croatia[18]		A court-appointed expert or legal entity, must be insured during the entire period of conducting the expertise. The lowest amount of liability insurance for the performance of a judicial expertise is HRK 200,000.00 (approx. 26,807.50 EUR) for natural persons and HRK 500,000.00 (approx. 67,018.74 EUR) for legal entities. A citizen of an EU Member State or State Parties to the Agreement on the European Economic Area may be insured for the performance of duties as an expert in his home country.
Poland[19]	There are no special civil provision for this subject. General regulations of civil law (tort/ contractual law) are applicable to experts' liability. In accordance with penal law, an expert who presents false opinion can be sentenced to up to 10 years of imprisonment.	Experts are not obliged to cover their possible liability via professional indemnity insurance.

17 "Liability of Experts: France," e-justice.europa.eu, last updated April 10, 2020, https://e-justice.europa.eu/topics/find-legal-professional/find-expert/fr_en.

18 "Liability of Experts: Croatia," e-justice.europa.eu, last updated April 9, 2020, https://e-justice.europa.eu/topics/find-legal-professional/find-expert/hr_en#iv-liability-of-experts.

19 "Liability of Experts: Poland," e-justice.europa.eu, last updated May 27, 2024, https://e-justice.europa.eu/topics/find-legal-professional/find-expert/pl_en#iv-liability-of-experts.

State	Rules related to liability of an expert	Insurance
Luxembourg[20]	There is no specific rule applicable to the liability of experts. Their action is thus governed by general tort and contractual rules. Such rules do not provide for any cap of liability.	There is no obligation for experts to cover their liability via professional indemnity insurance.
Malta[21]	General principles of tort and contract law are applicable with no cap on liability.	There is no obligation for experts to cover their liability via professional indemnity insurance.
Netherlands[22]	Experts are held liable according to general contract and tort law.	There is no obligation for experts to cover their liability via professional indemnity insurance. However, they may be insured by the company for which they work. Self-employed experts decide on their insurance cover at their own discretion, although several professional bodies make liability insurance compulsory.
Austria[23]	Experts are held liable according to the general contract and tort law.	They are obliged to cover their possible liability via professional indemnity insurance.
Portugal[24]	The regulations of Portugal do not contain a particular provision dealing with the expert's liability but general regulations (tort/contractual law) are applicable.	Experts are not obliged to cover their possible liability via professional indemnity insurance. An expert's liability is not subject to a cap by law.

20 "Liability of Experts: Luxembourg," e-justice.europa.eu, last updated January 26, 2024, https://e-justice.europa.eu/topics/find-legal-professional/find-expert/lu_en#iv-liability-of-experts.

21 "Liability of Experts: Malta," e-justice.europa.eu, last updated June 22, 2026, https://e-justice.europa.eu/topics/find-legal-professional/find-expert/mt_en#iv-liability-of-experts.

22 "Liability of Experts: Netherlands," e-justice.europa.eu, last updated October 16, 2024, https://e-justice.europa.eu/topics/find-legal-professional/find-expert/nl_en#iv-liability-of-experts.

23 "Liability of Experts: Austria," e-justice.europa.eu, last updated October 23, 2023, https://e-justice.europa.eu/topics/find-legal-professional/find-expert/at_en#iv-liability-of-experts.

24 "Liability of Experts: Portugal," e-justice.europa.eu, last updated April 7, 2024, https://e-justice.europa.eu/topics/find-legal-professional/find-expert/pt_en#iv-liability-of-experts.

State	Rules related to liability of an expert	Insurance
Romania[25]	Experts are held liable according to the general contract and tort law.	They are obliged to cover their possible liability via professional indemnity insurance.
Slovenia[26]	The expert's liability is not subject to a cap by law. General regulations are applicable.	Experts are not obliged to cover their possible liability via professional indemnity insurance.
Lithuania[27]	Experts are held liable according to the general contract and tort law.	Experts are not obliged to cover their possible liability via professional indemnity insurance.

The overall European picture reveals three existing models. The first model involves procedural and ethical oversight without mandatory insurance: this is the general approach in Lithuania, Spain, Italy, the Netherlands, and Sweden. In these countries, the law defines in considerable detail the expert's status, independence, qualifications, the content of the report, disciplinary liability, or judicial oversight, but does not establish a single mandatory insurance scheme applicable to all experts. The second model – insurance requirement through an appointment/accreditation mechanism: In Germany, the procedures for publicly appointed experts explicitly require liability insurance of '*angemessener Höhe*' (the right size), while in the United Kingdom, professional bodies of experts themselves set the standard for adequate insurance coverage. The third model is a mixed or *de facto* insurance model: for example in France, no general explicit statutory requirement has been identified, but the structure of the expert market, agreements between professional associations and insurance brokers, and the long statute of limitations make liability insurance *de facto* standard.

25 "Liability of Experts: Romania," e-justice.europa.eu, last updated January 22, 2021, https://e-justice.europa.eu/topics/find-legal-professional/find-expert/ro_en#iv-liability-of-experts.

26 "Liability of Experts: Slovenia," e-justice.europa.eu, last updated April 20, 2020, https://e-justice.europa.eu/topics/find-legal-professional/find-expert/si_en#iv-liability-of-experts.

27 Parliament of the Republic of Lithuania, Law on Forensic Expertise of the Republic of Lithuania, no. IX-1161, October 29, 2002, Valstybės žinios, no. 112-4969, November 22, 2002, https://www.e-tar.lt/portal/lt/legalAct/TAR.286DC4AF9827/asr.

3. Law and Economics of Forensic Expert Liability

What is Forensic Expert Professional Liability Insurance?

If you're a forensic expert in any field and are involved in preparing and providing evidence for legal proceedings, you may be accused of negligence, errors, or omissions and could face a claim for resulting financial damages. Commercial General Liability Insurance does not cover expert for financial losses resulting from errors in professional services or advice. However, for example, EasyCover offers Forensic Expert Professional Liability Insurance (also known as Errors and Omissions Insurance). This unique form of insurance can protect in the case an expert is sued for financial damages resulting from your forensic services or advice.[28]

We believe that typical claims might include the following:

1. Incorrect information:

   The expert prepares forensic opinion (conclusion) but use incorrect information in the report. Relying on this information caused financial loss to the party that engaged an expert, and they brought a claim in negligence. It is a very important circumstance because in most countries, forensic experts perform forensic examination of the materials that are presented by parties, pretrial institutions, or courts. So, the expert is not directly responsible for the quality and quantity of the materials to be examined.
2. Third-party error:

   As a forensic expert, you contract a portion of the investigative work to a third party – technicians, assistants, assistants, and other personnel, but direct responsibility for their work is on you. The testing was not done properly, and therefore, this evidence is inadmissible in court. The party who hired you as a forensic expert holds you liable for negligence.
3. Inappropriate utilization or loss of investigative materials:

   For example, the expert can use damaging methods and they can make the investigative documents not appropriate or even lost. Also, there may be situation, when the securing of the investigative materials or even case materials are not appropriate and results in loss of full or part of objects.

[28] "Professional Liability Insurance for Forensic Experts," Acera Insurance, accessed May 18, 2026, https://acera.ca/coverage/professional-liability-insurance-forensic-experts/.

Outcome is the same – the party who hired you as a forensic expert holds you liable for negligence.

In the US for example specialised insurance for Handwriting Experts may be found.[29] It covers:

- Negligence in keeping records and preparing reports, detailing findings, investigative methods, and laboratory techniques.
- Damaging parts of documents by mistake.
- Incorrect decipherment of obscure, deleted or damaged parts of documents.
- Incorrect identification of handwriting, typewriting, ink, paper, writing instruments and relationships of documents.
- Wrongly testifying in court about investigative or analytical methods or findings.

From a law and economics perspective, liability rules serve two primary functions – deterrence (encouraging optimal care) and risk allocation (distributing losses efficiently).

The challenge is to design a system that minimises the social cost of errors, which includes harm caused by incorrect expert opinions, the costs of litigation and enforcement, and the costs of precautions taken by experts. But all these acts may be subject to civil liability insurance if they are caused by negligence.

In theory, negligence-based liability encourages experts to take optimal precautions: they invest in quality (better methods, more thorough analysis) up to the point where marginal cost equals marginal benefit.

However, in forensic activities, this model is imperfect because:

- The 'correct' level of care is difficult to define *ex ante*,
- Scientific uncertainty makes it hard to distinguish negligence from unavoidable error or even purposeful action,
- Courts may lack the expertise, experience, and knowledge to evaluate expert performance.

This leads to two risks that may be defined as Under-deterrence risk – an expert may not internalize all risks, or Over-deterrence risk – fear of liability may discourage experts from participating or lead to overly defensive practices.

[29] "Handwriting Experts Insurance," Express Insurance, accessed May 18, 2026, https://www.expressinsurance.com.au/professional-indemnity-insurance/handwriting-experts-insurance.

Professional liability insurance modifies this model by spreading risk across a pool of insured professionals, reducing the financial impact of liability, and allowing experts to operate under uncertainty without excessive fear of ruin.

Nevertheless, from an efficiency perspective, insurance is justified when risks are unpredictable but statistically manageable, individual risk-bearing would be inefficient, and market conditions allow for accurate pricing.

However, as noted above, these conditions are not always met in forensic contexts due to limited claims data, heterogeneity of expert activities, and uncertain risk profiles.

4. Fairness Considerations: Corrective Justice and Procedural Integrity

While law and economics emphasise efficiency, legal systems also pursue fairness, particularly through corrective justice and procedural guarantees. *Corrective justice* demands that those who cause harm should compensate victims; furthermore, liability should reflect moral responsibility.

In forensic contexts, this principle is strained because:

- Harm may result without clear fault,
- Experts act within institutional constraints,
- Errors may be epistemically unavoidable.

Strict adherence to corrective justice may therefore produce unjust outcomes, either by imposing liability where fault is unclear or by leaving victims uncompensated where fault cannot be proven.

It should be noted that, with regard to *procedural fairness* (Article 6 of the ECHR), the case law of the European Court of Human Rights shifts the focus from the outcome to the process. The key question is not only whether the expert was wrong, but also whether the parties could challenge the expert, whether the methodology was transparent and generally recognised in the relevant scientific field, and whether the court exercised sufficient scrutiny.

This suggests that procedural safeguards may substitute for or complement liability, particularly where fault is difficult to establish.

The analysis of European Court of Human Rights jurisprudence reveals that the centre of gravity in expert-evidence cases under Article 6 ECHR has progressively shifted from whether the expert was substantively right to

whether the process was fair enough to justify reliance on the expert at all. The Court still repeats that admissibility and assessment of evidence are primarily matters for domestic law, but its case law now makes clear that where expert evidence is decisive in a technical field outside ordinary judicial competence, fairness depends on three process variables: the parties' effective ability to challenge the expert, transparency as to the expert's data and methodology, and genuine judicial scrutiny rather than passive deference. This line is visible from *Bönisch* and *Mantovanelli*, is sharpened in *Sara Lind Eggertsdóttir* and *Stoimenov*, and reaches its clearest modern articulation in *Matytsina*, *Korošec*, *Letinčić*, *Kartoyev*, and *Test-Achats*.[30]

The key doctrinal move is not that Article 6 creates a freestanding right to a court-appointed independent expert in every case. It does not. Rather, the Court asks whether the proceedings as a whole neutralised the structural epistemic imbalance created when one side, very often the State or a large institution, controls the expert infrastructure. Where fault, causation, disability, dangerousness, or technical mechanism are hard to prove directly, procedural safeguards can do some of the fairness work that substantive liability rules or burdens of proof do not do. In that sense, Article 6 does not replace negligence law, causation doctrine, or public-law entitlement rules; it compensates for their evidentiary asymmetries by insisting that uncertainty not be monopolised by one side's experts.[31]

The strongest recurring propositions in the Court's case law are these. First, if an expert opinion is decisive, parties must have a real and timely opportunity to know, contest, and test it; *ex post* commentary on an already crystallised report is often not enough. Second, methodological opacity can itself make proceedings unfair; parties must be able to understand the grounds, materials, and inferential steps behind the opinion. Third, courts must explain why they accepted a given expert, why they rejected challenges or requests for counter--expertise, and why they considered the existing safeguards sufficient. The Court's more recent 'no violation' cases do not retreat from these principles; they refine them by emphasising that a party must raise concrete objections and

30 For more information, see: European Court of Human Rights, Guide on Article 6 of the European Convention on Human Rights: Right to a Fair Trial (civil limb), Updated on February 28, 2026; European Court of Human Rights, Guide on Article 6 of the European Convention on Human Rights: Right to Fair Trial (criminal limb), Updated on February 28, 2026.

31 For example, European Court of Human Rights, case of Korošec v. Slovenia, application no. 77212/12, October 8, 2015; European Court of Human Rights, case of Letinčić v. Croatia, application no. 7183/11, May 3, 2016.

that not every official or institution-linked expert is automatically incompatible with Article 6.[32]

The following presents the results of a comparative analysis of selected ECtHR cases related to expert activities (*see Table 2*).

Table 2. Results of a comparative analysis of selected ECtHR cases related to expert activities[33]

Case name with link	Year	Facts	Procedural issues	ECtHR test and analysis	Outcome
Bönisch v. Austria[34]	1985	Public food institute director, whose institution had triggered the proceedings, acted as expert in criminal proceedings	Privileged institutional position of expert aligned with prosecution	Whether the expert's role created a structural procedural advantage inconsistent with equality of arms	Violation
Brandstetter v. Austria[35]	1991	Technical evidence disputed in criminal proceedings	Complaint that experts favoured prosecution	Not every unfavourable expert creates unfairness; the question is whether the expert had a materially privileged role and whether challenge was realistically possible	No violation

32 For example, European Court of Human Rights, case of Mantovanelli v. France, application no. 21497/93, March 18, 1997; European Court of Human Rights, case of Matytsina v. Russia, application no. 58428/10, March 27, 2014; European Court of Human Rights, Guide on Article 6 (civil limb).

33 The table is compiled by the authors.

34 European Court of Human Rights, case of Bönisch v. Austria, application no. 8658/79, May 6, 1985.

35 European Court of Human Rights, case of Brandstetter v. Austria, application no. 11170/84; 12876/87; 13468/87, August 28, 1991.

Case name with link	Year	Facts	Procedural issues	ECtHR test and analysis	Outcome
Mantovanelli v. France[36]	1997	Medical-liability action after severe treatment complications	Parties could not properly participate in expert inquiries and hearings	When expert opinion is likely to be technically decisive, parties must be able to participate in the formation of the report, not merely criticise it later	Violation
Sara Lind Eggertsdóttir v. Iceland[37]	2007	Medical-negligence dispute; courts relied on state medico-legal body	Objective doubts about neutrality due to ties with hospital sphere	Expert neutrality matters especially where the report carries decisive weight; fairness depends on the body's objective position and the parties' ability to challenge it	Violation
Stoimenov v. the former Yugoslav Republic of Macedonia[38]	2007	Criminal case relying on technical expert evidence from body linked to Interior Ministry	Refusal of alternative expert examination	If official expertise is central and effectively insulated from defense challenge, refusal of counter-expertise can violate equality of arms	Violation

[36] European Court of Human Rights, case of Mantovanelli v. France, application no. 21497/93, March 18, 1997.

[37] European Court of Human Rights, case of Sara Lind Eggertsdóttir v. Iceland, application no. 31930/04, July 5, 2007.

[38] Stoimenov v. the former Yugoslav Republic of Macedonia.

Case name with link	Year	Facts	Procedural issues	ECtHR test and analysis	Outcome
Matytsina v. Russia[39]	2014	Criminal proceedings based heavily on prosecution expert reports	Inability to effectively examine experts, obtain fresh expertise, or use defence specialists on equal terms	Article 6 requires practical, not merely formal, opportunities to contest decisive expert evidence	Violation
Korošec v. Slovenia[40]	2015	Social-security disability dispute; domestic courts relied on agency commissions	No independent expert despite structural asymmetry	Court must ask whether the claimant had adequate procedural means to overcome the imbalance caused by reliance on institution-linked expert bodies	Violation
Letinčić v. Croatia[41]	2016	Family disability benefit claim after veteran's suicide	Adverse psychiatric opinion not disclosed in time; no independent expert	Timely disclosure and effective opportunity to answer the decisive expert opinion are essential to adversarial fairness	Violation

39 Matytsina v. Russia.
40 Korošec v. Slovenia.
41 Letinčić v. Croatia.

Case name with link	Year	Facts	Procedural issues	ECtHR test and analysis	Outcome
Kartoyev and Others v. Russia[42]	2021	Terrorism-related proceedings with decisive forensic reports	Lack of access to technical basis of expert evidence; no effective examination of experts	Methodological opacity can render expert evidence unchallengeable; fairness may require access to underlying technical materials	Violation
Test-Achats v. Belgium[43]	2022	Civil proceedings against insurer; court-appointed expert had problematic institutional ties	Objective impartiality concerns regarding court-appointed expert	Even when parties can comment on the report, equality of arms may still be violated if the expert's structural neutrality is compromised and the court does not cure that	Violation of equality of arms; no separate violation of adversarial principle

The analysis shows that all these procedures are important not only for the purpose of a fair trial, but also for avoiding critical mistakes in forensic conclusions or in final court decisions where forensic evidence was essential.

5. Lithuania: Doctrinal Gap and Regulatory Asymmetry

Lithuanian law imposes compulsory professional liability insurance on a wide range of professions,[44] including:

42 Kartoyev and Others v. Russia.

43 European Court of Human Rights, case of Test-Achats v. Belgium, application no. 77039/12, December 13, 2022.

44 For example, Article 20 of the Law on the Lawyers of the Republic of Lithuania states: *The professional civil liability of a lawyer or a law firm for damage caused to natural or legal persons in the course of the lawyer's practice, exceeding 290 euros, shall be covered by compulsory*

- Lawyers,
- Notaries,
- Auditors,
- Insolvency administrators,
- Property valuers and others.

These professions share key characteristics, such as a high risk of financial harm, reliance on specialised expertise and functions performed, and impact on third parties. Despite similar characteristics, forensic experts are not subject to compulsory insurance. This creates a doctrinal inconsistency because an expert's influence on judicial outcomes is as much as, or more than, that of other regulated professionals. Yet they are treated as ordinary actors under general liability law.

There are several reasons why this gap may be justified, including but not limited to, historical perception of experts as auxiliary judicial actors, lack of organised professional structure (especially if we are talking about private experts), limited empirical data on liability risks, and also the reasons defined above, which are related to the evaluation of actions of an expert as negligence.

However, these explanations are increasingly unconvincing in light of the growing importance of forensic evidence, the expansion of liability in other professions and European trends toward accountability.

6. Efficiency vs Fairness: A Structural Tension

The Lithuanian example illustrates a broader European tension between:

1. Efficiency-oriented models (favouring flexible, market-based insurance),
2. Fairness-oriented models (favouring compensation and accountability).

---

insurance. (Parliament of the Republic of Lithuania, Law of the Republic of Lithuania on the Bar Association, no. IX-2066, March 18, 2004, Valstybės žinios, no. 50-1632, Apr 6, 2004, https://www.e-tar.lt/portal/en/legalAct/TAR.9F4371AB03A3/OwegOJybvp). A similar provision can be found in Article $6^{(2)}$ of the Law on Notaries of the Republic of Lithuania: *The professional civil liability of notaries for damage caused to natural or legal persons in the course of their professional activities, in excess of 290 euros, shall be covered by compulsory insurance*. (Supreme Council of the Republic of Lithuania, Law on Notaries of the Republic of Lithuania, no. I-2882. September 15, 1992, Valstybės žinios, no. 28-810, October 10, 1992, https://www.e-tar.lt/portal/en/legalAct/TAR.BE3136A78E80/gVPeGjhsBd).

From an economic perspective, compulsory insurance may be inefficient if risk is poorly understood, insurance markets are underdeveloped, and mandatory coverage increases costs without improving outcomes. This aligns with the caution that compulsory schemes can fail when market conditions are not met.

From a fairness perspective, compulsory insurance ensures compensation for victims, enhances trust in forensic expertise, and aligns forensic experts with other regulated professions. The absence of such insurance may leave injured parties without effective remedies, undermining both corrective justice and procedural legitimacy.

7. Towards a Hybrid Model of Epistemic Responsibility

The analysis suggests that neither pure efficiency nor pure fairness provides an adequate framework. Instead, a hybrid model is needed. This model should include:

1. Fault-based liability, to preserve incentives for professional care,
2. Insurance mechanisms, to ensure risk distribution and compensation,
3. Procedural safeguards, to guarantee fair trial standards.

For Lithuania, this could involve:

- Introducing targeted compulsory insurance for private forensic experts,
- Establishing minimum coverage thresholds, similar to other professions,
- Strengthening professional oversight and accreditation,
- Integrating insurance with procedural guarantees (e.g., disclosure obligations).

Such reforms would not only enhance protection for parties but also reinforce the institutional legitimacy of forensic expertise.

8. Conclusion

Mandatory civil liability insurance applicable to all forensic experts in Europe is the exception rather than the rule. In most of the jurisdictions examined, the obligation to have insurance does not arise solely from the status of ‘forensic

expert', but indirectly – through the underlying regulated profession, through rules governing public appointment or accreditation, or through market practice. The clearest regulatory framework was found in Germany, where the regulations for publicly appointed and sworn experts require liability insurance of 'adequate coverage'. In Lithuania, Spain, Italy, the Netherlands, and Sweden, the general official sources reviewed do not establish a general mandatory civil liability insurance obligation applicable to all forensic experts; in France, it was also not possible to reliably identify a uniform national minimum for mandatory civil liability insurance in the official primary texts, although market and professional practice indicate that such insurance is in fact considered standard there.

The liability of forensic experts cannot be adequately understood within a single doctrinal framework. It reflects a deeper transformation in legal systems, driven by the increasing importance of expert knowledge and the complexity of modern risks. Law and economics highlight the importance of efficient risk allocation, while corrective justice and human rights law emphasise fairness and procedural integrity. The challenge is to reconcile these perspectives.

The Lithuanian case demonstrates that current legal frameworks remain incomplete. By developing a hybrid model of epistemic responsibility, it is possible to move toward a more coherent and balanced approach – one that recognises both the value and the risks of forensic expertise.

References

Legal regulations

European Commission for the Efficiency of Justice. Guidelines on the Role of Court-Appointed Experts in Judicial Proceedings of Council of Europe's Member States (Document adopted by CEPEJ at its 24th Plenary meeting). 11–12 December 2014. https://rm.coe.int/168074827a.

European Court of Human Right, Council of Europe. European Convention on Human Rights. October 2, 2013. https://www.echr.coe.int/documents/d/echr/convention_ENG.

Parliament of the Republic of Lithuania. Law on Forensic Expertise of the Republic of Lithuania. No. IX-1161. October 29, 2002. Valstybės žinios. No. 112-4969. November 22, 2002. https://www.e-tar.lt/portal/lt/legalAct/TAR.286DC4AF9827/asr.

Parliament of the Republic of Lithuania. Law of the Republic of Lithuania on the Bar Association. No. IX-2066. March 18, 2004. Valstybės žinios. No. 50-1632. April 6, 2004. https://www.e-tar.lt/portal/en/legalAct/TAR.9F4371AB03A3/OwegOJybvp.

Supreme Council of the Republic of Lithuania. Law on Notaries of the Republic of Lithuania. No. I-2882. September 15, 1992. Valstybės žinios. No. 28-810. October 10, 1992. https://www.e-tar.lt/portal/en/legalAct/TAR.BE3136A78E80/gVPeGjhsBd.

Specialized literature

Gorbatkov, Andrej, and Gabrielė Juodkaitė-Granskienė. "Baudžiamieji procesiniai kompleksinių ir komisijinių ekspertizių reglamentavimo ypatumai." In *Lietuvos Respublikos baudžiamojo proceso kodeksui – 10 metų: recenzuotų mokslinių straipsnių, skirtų Lietuvos ir užsienio šalių baudžiamojo proceso, baudžiamosios teisės ir kriminalistikos aktualijoms ir problematikai, rinkinys*, edited by Gabrielė Juodkaitė-Granskienė, Andrej Gorbatkov, Remigijus Merkevičius. Lietuvos teismo ekspertizės centras, 2012.

Juodkaitė-Granskienė, Gabrielė, and Andrej Gorbatkov. "Forensic Examinations in Lithuania: 30 Years of Experience (1990–2020)." In *Legal Developments During 30 Years of Lithuanian Independence: Overview of Legal Accomplishments and Challenges in Lithuania*, edited by Gintaras Švedas, Donatas Murauskas. Springer International Publishing, 2021. https://doi.org/10.1007/978-3-030-54783-7_10.

Juodkaitė-Granskienė, Gabrielė, and Andrej Gorbatkov. "Klaidos problema teismo ekspertizėje." In *Lietuvos Respublikos baudžiamojo proceso kodeksui – 10 metų: recenzuotų mokslinių straipsnių, skirtų Lietuvos ir užsienio šalių baudžiamojo proceso, baudžiamosios teisės ir kriminalistikos aktualijoms ir problematikai, rinkinys,* edited by Gabrielė Juodkaitė-Granskienė, Andrej Gorbatkov, Remigijus Merkevičius. Lietuvos teismo ekspertizės centras, 2012.

Juodkaitė-Granskienė, Gabrielė, and Andrej Gorbatkov. "Міжнародне співробітництво в галузі криміналістики та судових наук. Роль громадських об'єднань у розвитку криміналістики та судових наук [The Sydney declaration – something new or something old forgotten?]." In *Нове століття криміналістики та судових наук: Liber Amicorum на честь академіка В. Ю. Шепітька: монографія [New Century of Criminalistics and Forensic Sciences: Liber Amicorum in Honour of Academician Valery Shepitko: monograph]*, edited by Mykhaylo Shepitko. Pravo, 2026.

European Court of Human Rights cases

European Court of Human Rights. Case of Korošec v. Slovenia. Application no. 77212/12. October 8, 2015.

European Court of Human Rights. Case of Letinčić v. Croatia. Application no. 7183/11. May 3, 2016.

European Court of Human Rights. Case of Mantovanelli v. France. Application no. 21497/93. March 18, 1997.

European Court of Human Rights. Case of Matytsina v. Russia. Application no. 58428/10. March 27, 2014.

European Court of Human Rights. Case of Bönisch v. Austria. Application no. 8658/79. May 6, 1985.

European Court of Human Rights. Case of Brandstetter v. Austria. Application no. 11170/84; 12876/87; 13468/87. August 28, 1991.

European Court of Human Rights. Case of Sara Lind Eggertsdóttir v. Iceland. Application no. 31930/04. July 5, 2007.

European Court of Human Rights. Case of Stoimenov v. the former Yugoslav Republic of Macedonia. Application no. 17995/02. April 5, 2007.

European Court of Human Rights. Case of Kartoyev and Others v. Russia. Application no. 9418/13. October 19, 2021.

European Court of Human Rights. Test-Achats v. Belgium. Application no. 77039/12. December 13, 2022.

European Court of Human Rights. Guide on Article 6 of the European Convention on Human Rights: Right to a Fair Trial (civil limb). Updated on February 28, 2026.

European Court of Human Rights. Guide on Article 6 of the European Convention on Human Rights: Right to Fair Trial (criminal limb). Updated on February 28, 2026.

Other sources

Acera Insurance. "Professional Liability Insurance for Forensic Experts." Accessed May 18, 2026. https://acera.ca/coverage/professional-liability-insurance-forensic-experts/.

e-justice.europa.eu. "Find an Expert." Last modified November 17, 2021. https://e-justice.europa.eu/topics/find-legal-professional/find-expert_en.

e-justice.europa.eu. "Liability of Experts: Belgium." Last updated April 27, 2023. https://e-justice.europa.eu/topics/find-legal-professional/find-expert/be_en#iii-liability-of-court-experts

e-justice.europa.eu. “Liability of Experts: Czech Republic.” Last updated September 8, 2023. https://e-justice.europa.eu/topics/find-legal-professional/find-expert/cz_en#iv-liability-of-experts.

e-justice.europa.eu. “Liability of Experts: Denmark.” Last updated May 9, 2022. https://e-justice.europa.eu/topics/find-legal-professional/find-expert/dk_en#iv-liability-of-experts.

e-justice.europa.eu. “Liability of Experts: Estonia.” Last updated April 10, 2020. https://e-justice.europa.eu/topics/find-legal-professional/find-expert/ee_en#iv-liability-of-experts.

e-justice.europa.eu. “Liability of Experts: Greece.” Last updated June 14, 2024. https://e-justice.europa.eu/topics/find-legal-professional/find-expert/el_en#iv-liability-of-experts.

e-justice.europa.eu. “Liability of Experts: France.” Last updated April 10, 2020. https://e-justice.europa.eu/topics/find-legal-professional/find-expert/fr_en.

e-justice.europa.eu. “Liability of Experts: Croatia.” Last updated April 9, 2020. https://e-justice.europa.eu/topics/find-legal-professional/find-expert/hr_en#iv-liability-of-experts.

e-justice.europa.eu. “Liability of Experts: Poland.” Last updated May 27, 2024. https://e-justice.europa.eu/topics/find-legal-professional/find-expert/pl_en#iv-liability-of-experts.

e-justice.europa.eu. “Liability of Experts: Luxembourg.” Last updated January 26, 2024. https://e-justice.europa.eu/topics/find-legal-professional/find-expert/lu_en#iv-liability-of-experts.

e-justice.europa.eu. “Liability of Experts: Malta.” Last updated June 22, 2026. https://e-justice.europa.eu/topics/find-legal-professional/find-expert/mt_en#iv-liability-of-experts.

e-justice.europa.eu. “Liability of Experts: Netherlands.” Last updated October 16, 2024. https://e-justice.europa.eu/topics/find-legal-professional/find-expert/nl_en#iv-liability-of-experts.

e-justice.europa.eu. “Liability of Experts: Austria.” Last updated October 23, 2023. https://e-justice.europa.eu/topics/find-legal-professional/find-expert/at_en#iv-liability-of-experts.

e-justice.europa.eu. “Liability of Experts: Portugal.” Last updated April 7, 2024. https://e-justice.europa.eu/topics/find-legal-professional/find-expert/pt_en#iv-liability-of-experts.

e-justice.europa.eu. “Liability of Experts: Romania.” Last updated January 22, 2021. https://e-justice.europa.eu/topics/find-legal-professional/find-expert/ro_en#iv-liability-of-experts.

e-justice.europa.eu. "Liability of Experts: Slovenia." Last updated April 20, 2020. https://e-justice.europa.eu/topics/find-legal-professional/find-expert/si_en#iv-liability-of-experts.

Express Insurance. "Handwriting Experts Insurance." Accessed May 18, 2026. https://www.expressinsurance.com.au/professional-indemnity-insurance/handwriting-experts-insurance.

Insurance Europe. "Liability Issues." Accessed May 26, 2026. https://www.insuranceeurope.eu/priorities/22/liability-issues.

Insurance Europe. "Insight Briefing: Compulsory Insurance: When It Works and When It Doesn't." 2017. https://www.insuranceeurope.eu/mediaitem/36cdb96f-a7c2-46a7-a4db-882d05869c41/Compulsory%20insurance%20Insight%20Briefing.pdf.

Merriam-Webster.com Dictionary. "Epistemic." Accessed May 25, 2026. https://www.merriam-webster.com/dictionary/epistemic.

Abstract

Forensic Expertise, Liability, and Insurance: Between Efficiency and Fairness in European and Lithuanian Legal Systems

The increasing reliance on forensic experts in judicial proceedings raises complex questions about liability, risk allocation, and procedural fairness. This article presents an analysis of forensic experts' liability through the lens of law and economics, integrating case law of European human rights courts and Lithuanian legal practice. It argues that the current predominance of fault-based liability and voluntary insurance reflects a tension between efficiency-oriented risk allocation and fairness-based corrective justice. The Lithuanian case illustrates a structural gap: despite extensive regulation of professional liability insurance in comparable professions, forensic experts remain largely outside compulsory schemes. The article proposes a hybrid model of 'epistemic responsibility' that reconciles economic efficiency with procedural and substantive fairness. In addition, it highlights the different characteristics of insurance specific to individual professions and even to certain aspects of professional practice in specific foreign countries: the U.S., France, Croatia, the Czech Republic, Belgium, the Netherlands, and others. By comparing the scope, requirements, and specific features of insurance for forensic expert activities across countries, the study seeks to answer the central question of this research: the necessity of civil liability insurance for forensic experts.

Keywords: forensic experts, forensic examination, insurance, civil liability, professional liability, application of justice

Santrauka

Teismo ekspertizė, atsakomybė ir draudimas: tarp veiksmingumo ir teisingumo Europos ir Lietuvos teisės sistemose

Vis didesnis pasitikėjimas teismo ekspertų paslaugomis teismo procesuose kelia sudėtingus klausimus ne tik dėl tokių įrodymų vertinimo, bet ir dėl galimų rizikų bei nuostolių užsakovams, jei teismo eksperto paslauga buvo suteikta netinkamai. Vienas iš galimų sprendinių, galinčių palengvinti šių rizikų keliamus padarinius galėtų būti privalomas privačių ekspertų veiklos draudimas, būtent jam ir yra skiriama pagridinė straipsnio analizės dalis. Joje nurodoma, kad vyraujantis draudimo modelis, grindžiamas kaltės sąlyga, sukelia prieštarą ir sunkiai gali būti pritaikomas teismo eksperto veiklai. Tai akivaizdžiai iliustruoja Lietuvos atvejis: nepaisant išsamaus profesinės atsakomybės draudimo reguliavimo panašiose profesijose, teismo ekspertai iš esmės lieka už privalomo draudimo sistemos ribų. Straipsnyje siūlomas hibridinis „episteminės atsakomybės“ modelis, suderinantis ekonominį efektyvumą su procesiniu ir materialiniu teisingumu. Be to, jame pabrėžiamos skirtingos draudimo ypatybės, būdingos atskiroms profesijoms ir netgi tam tikriems profesinės veiklos aspektams konkrečiose užsienio šalyse: JAV, Prancūzijoje, Kroatijoje, Čekijoje, Belgijoje, Nyderlanduose ir kitose. Lygindama teismo ekspertų veiklos draudimo apimtį, reikalavimus ir specifines ypatybes skirtingose šalyse, ši studija siekia atsakyti į pagrindinį klausimą: ar teismo ekspertams būtinas civilinės atsakomybės draudimas.

Pagrindiniai žodžiai: teismo ekspertai, teismo ekspertizė, draudimas, civilinė atsakomybė, profesinė atsakomybė, teisingumo įgyvendinimas

The Intersections of Criminal, Administrative and Civil Law:
International and National Contexts, pp. 277–336
https://doi.org/10.12797/9788383685328.12

Remigijus Merkevičius
Vilnius University, Faculty of Law, Department of Criminal Justice
remigijus.merkevicius@tf.vu.lt

Ligita Gasparėnienė
Vilnius University, Faculty of Law, Department of Criminal Justice
ligita.gaspareniene@tf.vu.lt

Rita Remeikienė
Vilnius University, Faculty of Law, Department of Criminal Justice
rita.remeikiene@tf.vu.lt

Evaldas Raistenskis
Vilnius University, Faculty of Law, Department of Criminal Justice
evaldas.raistenskis@tf.vu.lt

The Validity of the Right of the Defence Counsel (and the Suspect) to Meet Without Outsiders and to Communicate Without Interference in Lithuania, in Light of European Standards

1. Introduction

Relevance of the topic. Criminal proceedings constitute an ever-expanding (and constantly broadened by the authorities) social sphere in which a wide variety of needs and interests converge: the criminal justice system seeks to establish itself as the sole centre of power in the state, to provide the community with a sense (or impression) of security, and to deliver justice by punishing the guilty or acquitting the innocent; the victim demands moral (emotional) satisfaction and compensation for the harm suffered, whilst the person whom

the criminal justice system regards as a 'potential offender' – in Lithuania, they initially have the procedural status of a 'suspect' – and subsequently as a 'defendant' – has a vital interest in being treated as a 'human being' (that the inherent dignity characteristic of them, as of every other 'human being', is respected), that their freedom of will is preserved and that they are afforded an effective opportunity to be heard and to defend themselves. Although all these interests are equally well-founded and important, and public confidence in the courts (criminal justice) can only be ensured by a rational balance between them, nevertheless, the 'primary' subject of criminal proceedings – 'the person without whom the phenomenon of 'criminal proceedings' would not exist at all' – is the suspect (defendant)[1]: in the sense that if there were no suspect (defendant), there would be no criminal proceedings. It is no coincidence that, since around the end of 2009, the European Union has been focusing its attention on the rights and opportunities of suspects (defendants) in criminal proceedings.

In modern criminal proceedings (including those currently in force in Lithuania), a suspect enjoys extensive *procedural rights* – the suspect is granted the absolute right to remain silent and not to answer questions put to them (Article 21(4) of the Code of Criminal Procedure, Article 188(3) and (4)), and the suspect is, as it were, protected by the presumption of innocence (Articles 31(1) and[2] of the Constitution of the Republic of Lithuania) and the privilege against self-incrimination (Article 31(3) of the Constitution); however, 'passive protection' alone is not sufficient, and the 'fundamental' right of the suspect – i.e. 'the right that can have a real impact on the outcome of the pre-trial investigation' – is the suspect's 'right to actively defend themselves'. The right to actively defend oneself (to defend one's own interests) against charges is an 'innate human right' – a right that a person 'brings into the material world at birth', which no one has granted to them, and therefore no one can take away (has no 'right' to do so). The right to defend oneself is an expression of one of

1 Under Article 21(1) of the Code of Criminal Procedure of the Republic of Lithuania (hereinafter referred to as the Code of Criminal Procedure or CCP), a 'suspect' is (in simple terms) a person who has 'allegedly committed a criminal offence' and who is involved in the pre-trial investigation stage (the law itself – Article 21(1) of the CPC – is worded as follows: *a suspect is a participant in the pre-trial investigation*). Although the procedural status of the 'defendant' (the same person who has 'allegedly committed a criminal offence' and who participates in the hearing of a criminal case in the court of first instance (Article 22(1) of the Code of Criminal Procedure) is essentially analogous, this article, due to its scope, refers only to the 'suspect'.

2 The Constitution of the Republic of Lithuania, Valstybės žinios, no. 33-1014, November 30, 1992. Hereinafter referred to as the Constitution.

the fundamental human needs – the need for justice – and so this right belongs to everyone – both the 'best' and the 'worst' – people in the world.

The suspect's right to a vigorous defence is, in essence, a 'dual right' – it encompasses the suspect's (a.) 'right to defend oneself' and (b.) 'the right to be defended by a professional lawyer' – and it is only this synergy (between the joint efforts of the suspect and their defence counsel) that gives the suspect's 'right to a defence' (the suspect's defence as a procedural function) its greatest effectiveness. Without denying the importance of the right to defend oneself, nevertheless, in today's criminal proceedings, few suspects are able (or capable) of defending themselves against the charges brought against them and the power of the criminal justice system directed against them, relying solely on their own individual resources. This factual situation is determined by the scope and complexity of the criminal law in force (both substantive and procedural), as well as the ever-increasing pace of life, social exclusion and the constant emotional, economic and social tension that accompanies them.[3]

Firstly, despite the fact that classical principles of criminal law, such as *'nullum crimen, nulla poena sine lege'* and *'nullum crimen*, *nulla poena sine culpa*', are still readily invoked in public discourse, in order to clearly know what conduct is considered 'criminal' in the State of Lithuania, it is no longer sufficient to read the Criminal Code of the Republic of Lithuania[4] or any other law; one must also be familiar with the extremely broad and constantly evolving case law of the courts, and perhaps even the doctrine of criminal law. Furthermore, the legislature is constantly amending criminal law, and almost every initiative further expands the scope of criminal law. Thus, in order to understand criminal law and to orient one's life according to its requirements, one must either be a lawyer oneself or seek the assistance of a lawyer; 'general' human knowledge, experience and skills are simply insufficient. The 'criminal procedure law in practice' is exactly the same: although the Constitution and constitutional jurisprudence solemnly proclaim the special significance of a suspect's right to a defence and the right to have a lawyer for the fairness of criminal proceedings, and although all state institutions and officials involved in criminal proceedings are required *by law* to be objective and impartial, to explain to private

3 Remigijus Merkevičius, *Gynybos baudžiamajame Procese Pagrindai: Mokslo Monografija. Primoji Dalis* (Ksiegarnia Akademicka, 2024), pp. 114–115, https://doi.org/10.12797/9788383681115.

4 Parliament of the Republic of Lithuania, Law on the Approval and Entry into Force of the Criminal Code of the Republic of Lithuania. Criminal Code, no. VIII-1968, September 26, 2000, Valstybės žinios, no. 89-2741, October 25, 2000. Hereinafter referred to as the Criminal Code or CC.

individuals involved in criminal proceedings (first and foremost, of course, the suspect) of their procedural rights and to ensure they can exercise them; however, the reality of day-to-day 'procedural life' is 'far removed from the text of the law' – from what 'formal law' requires, from what is written in the Code of Criminal Procedure: the convoluted structure of criminal proceedings, the fragmentation of procedural powers and responsibilities amongst state institutions, the chronic reluctance of the criminal justice authorities to engage with people, procedural formalities and bureaucracy that obscure the 'essence' of the matter, the tendency to exploit a person's ignorance and inexperience, and so on, *ab initio* 'deprives' the individual of the 'necessary (essential) procedural subjectivity' and turns them into 'almost an object', who, solely because of 'despair-inducing ignorance', is determined and inclined simply to 'surrender to the hands of fate'.

Secondly, the effectiveness of an individual's participation in criminal proceedings is also significantly determined by human psychology: the news that a person has become a suspect – delivered like a bolt from the blue – reveals the undisguised bias of the criminal justice authorities, the shattering of 'romantic notions' regarding the integrity, honour (decency) of law enforcement and the associated expectations during the first encounter with the authorities, exhausting interrogations and the blatant mistrust displayed during them, procedural coercion of varying severity and intensity, as well as the threat (fear) of facing the consequences of criminal punishment, stigmatisation and other crude, inhuman and degrading treatment; ultimately, simply the constant, oppressive 'feeling of being caught up in a never-ending process' and so on, fundamentally alter a person's life – creating boundless mental strain, constant inner anxiety and emotional fear, forcing a re-evaluation of values and priorities, demanding enormous amounts of time and financial resources, and so on – and a person is never fully prepared for this. Put simply, the 'average person today' is unprepared to 'be a participant in criminal proceedings' and cannot adequately participate in criminal proceedings brought against them, nor communicate within them as required by today's procedural reality.

In summary, whilst it cannot be denied that a suspect has the right to defend themselves – and this is a crucial element of the suspect's procedural standing, lending the defence a new dimension and added weight – however, in today's Lithuania, as in other Western countries, a 'standard person' living under normal circumstances (not to mention those with special needs) has no real possibility of defending themselves alone, using their own individual knowledge and strength, without anyone's help, against the charges brought

against them and the power of the criminal justice system directed against them. The suspect requires an adviser and assistant who 'knows the law and has experience in applying it'. In the criminal proceedings of a state governed by the rule of law, such a 'professional adviser and assistant' is, and can only be, a lawyer (defence counsel): he has accumulated the necessary legal knowledge and possesses practical experience in the application of the law, devotes his time purposefully to this activity, and is motivated and internally resolved to defend another person.[5] In the current structure of criminal proceedings, where a genuine and effective defence against suspicion and, in particular, against the widespread use of procedural coercion is only possible with the participation of a defence lawyer, what is of decisive importance is not so much the suspect, but rather the procedural rights and opportunities granted to the defence counsel as an independent subject of criminal proceedings. The rights of the defence counsel are an intrinsic element of the suspect's procedural status; their effectiveness reflects the individual's relationship with the authorities and allows one to 'gauge the compliance of criminal proceedings with the principle of the rule of law'. The primary and one of the most important rights, without which the effective exercise of the defence's procedural functions – and, indeed, the exercise of any other right of defence – is impossible, is the defence counsel's (and, by extension, the suspect's) 'right to meet without outsiders and to communicate unhindered'. The 'free meeting and unimpeded communication' between the defence counsel and the defendant is the foundation of the defence – confidentiality, mutual trust, etc. – as well as of the professional practice of lawyers – independence, loyalty, etc.

Subject. The Lithuanian criminal justice system guarantees the right of the defence lawyer (and, by extension, the suspect) to meet in private and communicate without interference.

Objective. To examine the substance and effectiveness of the right of the defence counsel (and the suspect) to meet without third parties and to communicate freely within the Lithuanian criminal justice system, and to assess the compliance of prevailing practice in Lithuania with the standards set by international law and European Union law.

Objectives. In order to achieve the stated aim, the following three key objectives are set: (i.) to identify 'critical situations' in which the suspect is most in need of the defence counsel's advice and assistance, (ii.) to define, on the basis of the Code of Criminal Procedure and other Lithuanian national

5 Merkevičius, *Gynybos baudžiamajame Procese Pagrindai. Primoji Dalis*, pp. 112–113.

legislation, the scope of the right of the defence counsel (and, by extension, the suspect) to meet in private and communicate without hindrance, as guaranteed within the Lithuanian criminal justice system, and (iii.) to assess the quality, effectiveness and compliance with the standards set out in international law and European Union law of the right of the defence counsel (and the suspect) to meet in private and communicate without interference, as guaranteed in Lithuania.

Research methods. Analysis of legal acts; Analysis of scientific literature.

Originality. In the doctrine of criminal procedure law in Lithuania and other countries, there is a wealth of academic research that examines the procedural status of the defence counsel and the suspect (defendant) from various perspectives, analyses the individual procedural rights and opportunities of the defence counsel and the suspect (defendant), examine the implementation of European Union directives aimed at safeguarding the rights of the suspect (defendant), and so on, however, the effectiveness of the suspect's (defendant's) right to defence is not 'measured' by assessing the procedural rights, opportunities and their safeguarding granted not to the suspect (defendant) themselves, but to their defence counsel. This gap is attempted to be addressed in the JUST-2025-JCOO CRIDE (101251391) project. The task set for it is his project aims to conducting a comprehensive analysis of how the right to defence in implemented across the EU, focusing on the role of defence counsel and its effectiveness in ensuring fair trial guarantees. This academic article presents part of the project's results – it examines the effectiveness of the right of the defence counsel (and, by extension, the suspect) to meet without third parties and to communicate freely, as guaranteed in the Lithuanian criminal justice system, and its compliance with the standards set out in international law and European Union law.

2. 'Critical Situations' in Which the Suspect Most in Need of the Defence Counsel's Advice and Assistance

Criminal proceedings have a negative impact on virtually all 'non-professional' private individuals who enter them voluntarily, and even more so on those drawn into them by force: for suspects, they entail restrictions on their freedom, privacy and rights; for victims – with painful memories and 're-opened emotional wounds'. However, criminal proceedings (specifically criminal proceedings, not the criminal act itself) have the most negative impact on the suspect: a person who, until then, usually had no personal knowledge or experience of the

criminal justice system, whose view of the criminal justice system was shaped by talk, romantic films and the mass media, is suddenly 'thrown' into an environment that is completely alien, unfamiliar and never contemplated, an environment steeped in coercion, hostility, hypocrisy and deceit. Early-morning searches, arrest, the laying of charges and numerous restrictions on rights; the suspect's procedural status alters or severs many of the social ties that previously ensured peace and comfort: the person loses their job and income and, as a result, can no longer meet their daily needs or fulfil their financial obligations; friends who were once close distance themselves or begin to avoid them; the suspect loses not only their freedom or rights, but also their inner (emotional) peace, mental balance, self-confidence and trust in their social environment. Along with, the suspect's immediate social circle – spouse, children, parents, etc. – also suffers (sometimes even more so). In such a situation, the defence lawyer has a special role and purpose.

This article identifies and discusses in greater detail four typical 'critical situations' in which a suspect is most in need of a defence lawyer's support and assistance. Of course, this classification is somewhat arbitrary.

The first 'critical situation' usually 'befalls' the suspect at the very initial stage of the criminal proceedings, when the suspect is drawn into the criminal proceedings – is officially informed or learns that criminal proceedings have been initiated against them, in which the aim is to impose a criminal penalty: the person is summoned for questioning as a suspect or is even detained. Essentially, a suspect is in a 'critical state' whether they are detained (deprived of their liberty) or formally (physically) free, but who, emotionally (in their mind), are already 'drawn into the criminal proceedings and cannot escape them'. Of course, the situation of a detained and, in particular, an arrested suspect is significantly more precarious (even more 'critical') than that of a free suspect: whereas a suspect at liberty can freely visit their defence lawyer, call them whenever they wish, and 'share the emotional strain' with their loved ones, a detained (or arrested) suspect must endure all the emotional strain that has overwhelmed them alone. The suspect's primary need and interest at this initial stage of the criminal proceedings is the desire to know and adequately understand their new – 'criminal procedural' – status, the changes associated with it, and the prospects ahead.

Detention, and particularly prolonged detention, restricts not only the liberty and fundamental rights (privacy, freedom of communication, etc.) of the detained suspect, but also their ability to defend themselves against the charges brought against them. First and foremost, the psychological and emotional state of the

suspect, determined by their deprivation of liberty, results in their inability to concentrate, understand adequately, react appropriately and communicate. At this moment of 'mental weakness and vulnerability' – determined by detention – due to stress, overwhelming negative emotions, fear of the unknown and the image of detention facilities that has been created, a detained (arrested) suspect is prepared to sacrifice a great deal, even his own defence and future: to 'confess to anything' just to regain his freedom immediately. On the other hand, the inability to move and communicate freely results in an inability to gather exculpatory evidence and to prepare effectively for future proceedings (in practice, the situation of a detained (arrested) suspect sometimes reaches a level of 'everyday absurdity' where, for example, the detainee is unable to read the criminal case file because the prosecuting authorities or the court have not provided him with a copy of the case file, and he himself cannot afford to 'buy a copy of his own case file'). Thus, a detained (arrested) suspect, as well as one who is threatened with detention or arrest, wants and seeks for such a threatening situation to end or change as quickly as possible, without delay. This is the primary and most important, one might even say 'innate and vital', desire, need and interest of a person who has lost their freedom – a person who has been detained (arrested).

Arrest poses a threat to the defence also because of the prevailing 'procedural morality' (or, more precisely, 'immorality') in that – however much the objectivity, impartiality and fairness of the courts may be proclaimed in professional and public discourse – 'real life' teaches us that the longer a suspect remains in custody, the less likely it is that the suspect will be released from custody before the court's verdict, found not guilty (acquitted) or given a sentence not involving deprivation of liberty.[6] Thus, detention causes immense potential harm not only to the suspect's comfortable life and rights, but also to the defence as a procedural function; therefore, the defence lawyer must make every effort to protect or restore the defendant's freedom in the interests of an effective defence.

The second 'critical point' at which the suspect experiences both a rational – pragmatic – and a psychological – emotional – need for legal assistance is the moment when the suspect must decide on their defence position and the strategy for implementing it: first and foremost, whether to give evidence or not, and if so, what to say. Essentially, a defence lawyer is needed by the suspect (and is useful

6 Carsten Momsen, "U-Haft schafft Rechtskraft. Rechtswidrige „Post-mortem"-Absprache, Befangenheit und Fehlurteil," *Strafverteidiger Forum* 3 (2019): pp. 89–95; Heribert Ostendorf, "U-Haft Vollzug – Stiefkind der Strafrechtspflege," *Neue Kriminalpolitik* 21, no. 4 (2009): p. 128.

to them) to help them prepare properly for the criminal proceedings,[7] first and foremost, of course, for questioning (especially the first), as well as for other procedural steps in which the suspect will have to or is required to participate personally and directly, so that the suspect's participation in 'their own trial' is effective rather than theoretical – the role of a 'spectator on the sidelines' – so that the suspect views 'his own criminal proceedings' not as a 'train speeding away or rushing past at full speed', but as a real opportunity to defend himself, prove his innocence and rehabilitate himself in the eyes of society.

Before a suspect decides on a specific defence strategy, they are faced with a host of questions they have never encountered before: for example, how well-founded and convincing their testimony is, what benefits or risks a 'strategy of silence' entails, how a change in defence strategy will affect their legal position and the prospects of the case, or what will happen if their testimony is later proven to be false, and so on. These questions are not easy for the defence lawyer either. There are no 'ready-made recipes' in defence. The decision whether to speak or not is one of the greatest dilemmas facing a suspect – both silence and giving evidence *in concreto* can be beneficial, but they can also be disastrous: for example, the decision to remain completely silent and not participate in the questioning on that occasion may restore the defendant's inner peace, allowing them to calmly gather their thoughts and prepare for a 'changed' life; by remaining completely silent, the suspect does not actively contribute to their own conviction; by not giving evidence, the suspect does not make the prosecutor's job any easier – not knowing what the suspect will say regarding the charges, the prosecutor is forced to prove all the incriminating facts themselves, and this often narrows the scope (limits) of the charges; by giving evidence at a later stage, the suspect may 'adapt to the circumstances that the prosecution has managed to prove' and so on,[8] but on the other hand, by refusing to give evidence, the suspect deprives himself of a very useful tool for proving his case and for his defence – himself; by refusing to give evidence entirely, it is usually impossible to secure any 'legal concessions' beneficial to the suspect, such as simplified procedural forms or the termination of the pre-trial investigation on a discretionary basis; Although this is rarely stated openly (and is more often publicly denied), there remains a persistent view among judges that 'he who has something to hide remains silent', and so on.[9]

7 Stephan Barton, *Einführung in die Strafverteidigung*. 2nd edition (C. H. Beck, 2013), pp. 223–224.

8 Merkevičius, *Gynybos baudžiamajame Procese Pagrindai. Primoji Dalis*, pp. 468–473.

9 Merkevičius, *Gynybos baudžiamajame Procese Pagrindai. Primoji Dalis*, pp. 474–475.

Thus, the decision whether to speak or not, and if so, what to say, is a very difficult internal decision, often determining the outcome of a criminal case; therefore, its rationality and effectiveness are largely determined by in-depth legal knowledge, diverse professional experience, and the ability to forecast and strategise.

The third typical 'critical situation', in which the suspect becomes (or feels) particularly vulnerable and requires the support and assistance of a defence lawyer, arises when the suspect is required to speak – to give evidence, particularly during the initial interview. The suspect never comes to terms with the mental strain that accompanies giving evidence, but the mental strain, stress and fear that the suspect feels during the first interview can hardly be compared to subsequent interrogations (over time, a person comes to terms to some extent with having to participate in criminal proceedings, gains knowledge and experience, and naturally adapts to the changed situation). Meanwhile, during the first interrogation, the suspect is met with full intensity and, throughout the entire interrogation, is accompanied by the 'coercive atmosphere' of the intimidating and threatening location where the interrogation takes place, the intimidating appearance of the interrogating officer, a piercing gaze that clearly demonstrates distrust, constant uncertainty and fear that a question will be asked which the suspect will be unable to answer, and that this will determine his fate. Even a suspect who has prepared for the interrogation in advance, 'the moment they step over the threshold of the interrogation room', forgets essentially 'everything they had learnt' – including their rights, what must be said during the interview, what must under no circumstances be said, the fact that they must not rush, and that they must remain attentive and focused throughout the interview, and so on; throughout the entire questioning, the suspect is weighed down by the very real threat of criminal liability; the suspect is unable to distance himself from this and concentrate on the questioning, and so essentially 'does not hear or understand' the true meaning of the words spoken to him; they are unfamiliar with formal legal language; consequently, they pay no attention to the meaning, accuracy and legal significance of the words they use, nor to possible ambiguities, and are easily swayed by the persuasion and arguments of the pre-trial investigation officer; they try to 'leave the interview room' as quickly as possible, and so do not examine the interview transcript in detail, and sometimes do not even read it at all; they do not dare to make comments, raise objections or demand corrections to the text of the transcript, etc.

The legal assistance and basic human support provided by a defence lawyer to the suspect are therefore essential during his questioning. By personally

and directly participating in all of the defendant's interrogations, the defence lawyer, first and foremost, protects and defends the suspect against the arbitrary actions, abuse of power and manipulation of the criminal justice authorities. On the other hand, the defence lawyer must assist the defendant during questioning in actively exercising their right to be heard: to present their defence position in detail and comprehensively during questioning, to disclose factual circumstances and legal arguments relevant to the defence, to refute the prosecution's claims, and so on.[10] During the questioning, the defence lawyer must listen carefully to the content of the suspect's statements and immediately assess their significance responsibly, must read the interrogation record and strictly insist that the record accurately reflects the content of the suspect's testimony – which is beneficial to the defence; if necessary, the defence lawyer must also ask questions of the defendant being questioned.

A suspect often falls into a deep 'psychological and emotional trough' when the prosecuting authorities or the court begin to address issues directly related to their liberty, rights or fate, a significant change in the course of the criminal proceedings, and so on; when the suspect realises or senses that a certain turning point may be approaching in 'his case', which could significantly and permanently alter his life: for example, when the investigating judge considers the prosecutor's request to remand the suspect in custody or extend the period of detention, or when the prosecutor informs the suspect of the conclusion of the pre-trial investigation, the drafting of the indictment and the referral of the criminal case to court, etc. There are many such 'turning points' of a legal and emotional nature in criminal proceedings, and they are often determined by the suspect's individual attitude (for example, some view the prosecutor's notification of the referral of the criminal case to court as 'the start of the final stage before being sent to prison', whilst other suspects see it as a real chance to 'finally defend themselves'; such differing attitudes, and the associated need for a defence lawyer's assistance, are also triggered by, for example, searches or other coercive procedural measures). At these procedural junctures, the suspect is once again overcome by immense fear and anxiety – even panic – about the future: the suspect realises or feels that 'now is the time to act', 'to take fate into their own hands', yet at the same time the suspect feels powerless, as they neither know what to do nor possess the necessary experience and skills. In such 'critical situations', a defence lawyer is essential to the suspect

10 Remigijus Merkevičius, *Gynybos baudžiamajame Procese Pagrindai: Mokslo Monografija. Antroji Dalis* (Ksiegarnia Akademicka, 2024), pp. 12–21.

both to offer a reassuring, hopeful word and provide emotional support, and because, by drawing on their knowledge, competence, experience and skills, to show the defendant the 'way forward' and to actively resist the 'potential pain or harm' that the criminal justice authorities wish to inflict on the suspect. Somewhat differently from the 'critical situations' discussed previously, in which the defence lawyer's activities are more focused on providing effective assistance so that the suspect can defend themselves, in situations determining the suspect's freedom, rights or fate, the defence lawyer is needed not only to advise or assist the suspect in defending themselves, but also for the defence lawyer themselves to actively and with the necessary initiative 'defend the defendant': gather and present exculpatory evidence, put forward arguments mitigating liability, draft the necessary documents, etc. In these procedural situations, the need for and importance of professional defence reach their peak; the defence lawyer and the defendant must pool their efforts and resolve, so the role of the defence lawyer becomes even more prominent and significant.

3. The Primary and One of the Most Important Rights, Which Ensures the Real and Effective Protection and Defence of a Suspect in 'Critical Situations', is the Right of the Defence Lawyer (and, by Extension, the Suspect) to Meet Without the Presence of Third Parties and Unhindered Communication

In 'critical situations', the defence lawyer provides the assistance and support that the defendant needs (or simply desires) by making creative use of various procedural rights and options not prohibited by law. As already mentioned, legal theory does not provide 'ready-made formulas', so the defence lawyer must himself find the right words, actions or tactical moves for the specific situation and the specific defendant. Taking into account the significance of individual defence counsel's rights for the defence of the suspect as a procedural function (providing a wealth of practical benefits) and the nature and manner in which defence counsel's rights are regulated in the Code of Criminal Procedure, the Law on the Bar of the Republic of Lithuania[11] and other Lithuanian national legislation, it is

[11] Parliament of the Republic of Lithuania, Law on the Approval, Entry into Force and Implementation of the Code of Criminal Procedure of the Republic of Lithuania. Code of Criminal Procedure, no. IX-785, March 14, 2002, Valstybės žinios, no. 37-1341, April 9, 2002. Hereinafter referred to as the Law on the Bar or the LB.

reasonable to classify 'defence counsel's rights'[12] into the following six conditional groups:[13] (i.) the rights of a defence counsel which, in and of themselves (as such), do not directly allow the defence counsel to influence the course, direction or outcome of criminal proceedings, but rather assist in the practical and effective exercise of other defence rights; this group of defence counsel's rights includes (a.) the right of the defence counsel to meet with the defendant in private and to communicate with them without hindrance (Articles 44(8) and 48(1)(2) and (3) of the Code of Criminal Procedure, Article 45 of the Law on the Bar) and (b.) the right to access the data of the pre-trial investigation and/or the materials of the criminal case (Articles 48(1)(1) and (8), 181 and 237 of the Code of Criminal Procedure), (ii.) the defence counsel's right to actively participate in procedural actions carried out by state criminal procedure authorities; this group of the defence counsel's rights includes the right to participate in (a.) all questioning of the defendant (Article 48(1)(2) of the Code of Criminal Procedure), (b.) all proceedings conducted with the defendant (Article 48(1)(4) of the Code of Criminal Procedure), (c.) all proceedings carried out at the request of the defendant or the defence counsel (Article 48(1)(4) of the Code of Criminal Procedure) and (d.) all other 'evidence-gathering proceedings', provided that this is permitted by the pre-trial investigation officer, the prosecutor or the judge (Article 48(1)(5) of the Code of Criminal Procedure), (iii.) the defence counsel's right to conduct an independent investigation (Article 48(1)(7) of the Code of Criminal Procedure, Article 44(2) of the Law on the Bar), (iv.) the defence counsel's right to submit requests (Article 48(1)(9) of the Code of Criminal Procedure), (v.) the defence counsel's right to demand (seek) that an objective and impartial trial be ensured, inter alia, the right to challenge (Article 48(1)(9) of the Code of Criminal Procedure) and (vi.) the defence counsel's right to appeal against the procedural actions and decisions of state criminal procedure authorities and to participate in court hearings when these appeals are being examined (Article 48(1)(10) of the Code of Criminal Procedure).

This academic article uses the Lithuanian criminal procedure system as a case study to examine the rights of a single defence lawyer (who also acts as the suspect's representative), which help the suspect to 'cope effectively' with the 'critical situations' outlined above – the right to meet without outsiders and to communicate unhindered – are discussed.

12 This concept is conditional, but this aspect is not discussed in greater detail in this academic article.

13 Merkevičius, *Gynybos baudžiamajame Procese Pagrindai. Primoji Dalis*, p. 514.

The primary need and interest of a suspect in criminal proceedings directed against them is the need to meet and communicate with a lawyer (defence counsel). All suspects have this need (interest), regardless of whether they are at liberty or have already been taken into custody and are being held in detention (detained or arrested). Of course, the opportunity to meet and speak with a defence counsel is significantly more important and essential for a detained (arrested) suspect than for one who is at liberty. Detention (Article 140 of the Code of Criminal Procedure), arrest (Articles 122–131 of the Code of Criminal Procedure) and other procedural measures restricting a person's freedom of movement (by their nature and purpose) are not intended to 'deprive' or restrict a suspect's right to a defence. A detained (arrested) suspect can, *ipso facto,* only prove his innocence or otherwise actively participate in the criminal proceedings with the assistance of a defence counsel (he can no longer do so personally and independently because his liberty has been deprived and he is held in isolation), therefore, the very fact that the suspect is detained (arrested) means that this suspect – having lost their liberty – requires the support and assistance of a defence lawyer more than a person at liberty. If a detained (arrested) suspect is also denied the opportunity to meet and communicate directly with their defence counsel without third parties, or to communicate with their defence counsel using technical means without any external monitoring or recording, the detained (arrested) suspect would be artificially 'pushed' into a clearly unequal (unjustifiably discriminatory) factual and legal position, even when compared to suspects who remain at liberty.[14]

A suspect requires a defence lawyer immediately – that is, when the person is 'brought into the criminal proceedings as a suspect': in accordance with Article 21(2) of the Code of Criminal Procedure, when they are (a.) summoned for questioning as a suspect, (b.) questioned as a suspect, or (c.) detained. Article 31(6) of the Constitution also stipulates that the right to have a lawyer is guaranteed to a suspect 'from the moment of his detention or first questioning'. Essentially, international law and European Union law also emphasise the same initial moment at which a suspect must be afforded (guaranteed) the opportunity to receive legal assistance.

For instance, Principle 11 of the United Nations 'Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment' of 9 December 1988[15] generally states, *inter alia*, that a detained person has the right

14 Merkevičius, *Gynybos baudžiamajame Procese Pagrindai. Primoji Dalis*, pp. 524–526.

15 United Nations General Assembly, Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, resolution no. 43/173, December 9, 1988, https://docs.un.org/en/a/res/43/173.

to defend himself or to have the assistance of a lawyer, as provided for by law. In accordance with Principle 15 of the Body of Principles, subject to the exceptions set out in Principle 16(4) and Principle 18(3) of the Body of Principles, a detained (imprisoned) person may not be allowed to communicate with the outside world, including with their family or a lawyer, for a period not exceeding a few days. Principle 16 of the Body of Principles emphasises the duty of the competent authority to explain to a detained person, immediately upon detention, their 'right to legal assistance from a lawyer' and to provide reasonable opportunities to exercise that right. Paragraph 3 of Principle 18 of the Code specifies that the right of a detained (imprisoned) person to meet with a lawyer immediately and without censorship, in conditions of complete confidentiality, consult and communicate with him or her may not be temporarily suspended or restricted, except in exceptional circumstances prescribed by law or rules adopted on the basis of law, where, in the opinion of a court or other authority, this is necessary to ensure security and order.

27 August – 7 September 1990: 'Basic Principles on the Role of Lawyers' adopted by the United Nations Congress[16] Paragraph 5 obliges governments to ensure that the competent authorities promptly inform every person of their right to have the assistance of a lawyer of their own choosing when that person is detained (arrested) or charged with a criminal offence. Under Principle 7, all persons who are detained or arrested, whether or not they have been charged with a criminal offence, must have the opportunity to meet with a lawyer without delay, and in any event no later than 48 hours from the time of detention (arrest).

The 'Principles and Guidelines on the Right to Legal Aid in Criminal Justice Systems', adopted by the United Nations General Assembly on 20 December 2012,[17] Principle 3 ('Provision of legal assistance to persons suspected or accused of a criminal offence') states that States must ensure that every person who is arrested, arrested, suspected or charged with a criminal offence punishable by imprisonment or the death penalty, has the right to legal aid at all stages of the criminal proceedings (para. 20). Principle 7 concerns the 'timeliness and effectiveness of legal assistance': the state must ensure timely and effective legal assistance at all stages of the administration of criminal justice (para. 27), the

16 The Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Basic Principles on the Role of Lawyers, Septemer 7, 1990, https://www.ohchr.org/en/instruments-mechanisms/instruments/basic-principles-role-lawyers.

17 United Nations General Assembly, United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, resolution no. 67/187, December 20, 2012, https://docs.un.org/en/a/res/67/187.

effectiveness of legal assistance includes, but is not limited to, ensuring that detained persons have unrestricted access to a lawyer, guaranteed confidentiality of communications, access to the case file, and sufficient time and facilities to prepare their defence (para. 28). The implementation and safeguarding of the right to information on the legal aid provided is also defined in Guidelines 2 and 3 (paras. 42–43): specifically, Guideline 3 states that states must: (a.) take measures to ensure that every person who is detained, arrested, suspected or accused, as well as a person being prosecuted for a criminal offence, is immediately informed of the right to remain silent; the right to consult a lawyer or, where entitled to do so, a legal adviser at any stage of the proceedings, in particular prior to questioning by the competent authorities, as well as the right to be assisted by an independent lawyer or legal adviser during questioning and other procedural steps; (b.) unless there are serious grounds to the contrary, prohibit any questioning by any police officer in the absence of a lawyer, unless the person consciously and voluntarily waives (agrees to waive) the presence of a lawyer, and establish mechanisms to verify the voluntary nature of the person's consent; the questioning may not commence until a lawyer has arrived; (d.) ensure that such persons are granted a meeting with a lawyer or legal adviser immediately upon their arrest, under conditions of complete confidentiality, and guarantee the confidentiality of such future contacts; (h.) provide facilities in police stations and places of detention for contacting a lawyer, etc. The provision of legal assistance at the pre-trial investigation stage is also defined in Guideline 4.

The Convention on the Protection of the Profession of Lawyer, signed on 13 May 2025 by the ministers of thirteen Council of Europe member states,[18] although it does not elaborate on the right of the accused to defend themselves with the assistance of a defence lawyer, or on the procedural rights and opportunities of lawyers in criminal proceedings, Article 6 of the Convention nevertheless recalls that states must ensure that lawyers are able to: *a) to offer and provide legal advice, assistance and representation, including in the defence of human rights and fundamental freedoms, <…> c) to communicate promptly and effectively with their clients and potential clients, even if they are deprived of their liberty, d) be recognised as persons entitled to provide advice, assistance or representation to their clients,* <…>. Article 6(3) of this Convention also enshrines a fairly broad concept of confidentiality and the need to protect it.

18 The Council of Europe, Council of Europe Convention for the Protection of the Profession of Lawyer, https://www.ccbe.eu/fileadmin/speciality_distribution/public/images/pages/projects/ENFR_2025_Convention-on-the-Protection-of-the-Profession-of-Lawyer.pdf.

The right to a defence is also specifically highlighted in the international legal instrument that carries the greatest doctrinal weight and practical significance for the protection of the rights of the accused – the European Convention on Human Rights (together with subsequent Protocols)[19]. Formally speaking, the aspect of the right to defence that is relevant *in this specific case* is enshrined in Article 6(3)(c) of the Convention, which states that *everyone charged with a criminal offence shall be entitled to the following minimum guarantees: <...> (c) to defend himself in person or through legal assistance of his own choosing <...>" (and, in part, in Article 6(3)(b) of the Convention, which notes the accused's right 'to have adequate time and facilities for the preparation of his defence'*). Of course, this in no way implies the conclusion that Article 6(3)(b) and (c) of the Convention (or Article 6(3) of the Convention in general) is *the sole provision of the Convention in which the effectiveness of the accused's right to a defence begins and ends*. Far from it. Firstly, the effectiveness of the accused's right to a defence, or of the defence as a procedural function, is determined by a multitude of other rights of the accused and procedural safeguards afforded to him, enshrined in other provisions of the Convention, such as the presumption of innocence, the right to cross-examine prosecution witnesses and to have defence witnesses examined under the same conditions as those applied to prosecution witnesses, the right to free assistance of an interpreter (Article 6(2) and (3) of the Convention) or the right to appeal against a conviction to a higher court (Article 2 of Protocol No. 7 to the Convention). Secondly. The right to a defence is also guaranteed in certain respects by provisions of the Convention that appear to be of a somewhat more general nature or 'more removed from criminal proceedings', such as, for example, the prohibition of torture and inhuman or degrading treatment (Article 3 of the Convention), the principle of *nullum crimen, nulla poena sine lege* (Article 7 of the Convention), the protection of family life, private life and the confidentiality of communications (Article 8 of the Convention), and the obligation to ensure effective legal remedies (Article 13 of the Convention), etc. Without a real opportunity to make effective use of these rights, the right to a defence would be 'toothless' (Latin: *nudum ius*). Thirdly (this legal aspect is particularly important). The content of the accused's right to a defence is also determined by the relationship between Article 6(3) of the Convention and Article 6(1) of the Convention, which defines the fundamental 'general' value or objective that the Convention essentially seeks to achieve or protect. This relationship, on the one hand, may to some extent 'elevate' and enrich the defendant's right to a defence in terms of value, but, on the other hand, it also significantly narrows the autonomy of the defendant's right to

a defence and, consequently, reduces the effectiveness of this right. The right of the accused, enshrined in Article 6(3)(c) of the Convention, to have a lawyer, to meet and consult with him, etc. the European Court of Human Rights[19] does not regard this as a separate, independent or autonomous right of the accused, which is a value in itself, so that a violation of this right alone gives rise to procedural legal consequences, but rather as a right which is intended more to safeguard the accused's right under Article 6(1) of the Convention to remain silent and not to testify against oneself, and the requirement to ensure a 'fair trial'. In the case law of the ECtHR, the accused's right to have a lawyer and to avail themselves of their assistance is not a separate, independent right, but an integral part of a 'fair criminal trial', its minimum guarantee. Thus, the reality and effectiveness of the accused's right to a defence counsel in the case law of the ECHR are assessed by analysing not only individual elements of the right to defend oneself with the assistance of a defence counsel, nor even the essence of the right to a defence counsel, but also whether the violation of this right of the accused, *in concreto*, rendered the criminal proceedings as a whole unfair or 'unfair'.[20]

To illustrate this 'legal assessment algorithm or standard' developed in the case law of the European Court of Human Rights, using the example of a detained defendant's right to meet and consult with a defence lawyer prior to the first interrogation, it would follow that, in order to establish a violation of Article 6(1) and Article 6(3)(c) of the Convention, it is necessary to establish the following 'legal totality': (i.) the detained defendant (against his will) was unable to meet with and consult a defence lawyer in private prior to the first interrogation or during the interrogation, and this constituted a violation of the detained defendant's right, (ii.) during the interrogation, the detained defendant was not informed of or guaranteed the right to remain silent and the right not to incriminate himself, and (iii.) during the court proceedings, the self-incriminating evidence given by the accused during the pre-trial investigation, in the absence of a defence counsel, was assessed in the court's final judgment to the detriment of the accused as one of the most important pieces of incriminating evidence. Only in the presence of such or a similar set of legally significant facts can it be concluded that the violation of the defendant's right to meet with and

19 Hereinafter referred to as the ECHR.

20 Joachim Renzikowski, "Das Recht auf den Beistand eines Verteidigers im Lichte von Art. 6 Abs. 3 lit. c EMRK und des 6th Amendments zur US-Verfassung," in *Strafrecht als Scientia Universalis. Festschrift für Claus Roxin zum 80. Geburtstag am 15. Mai 2011*, ed. Manfred Heinrich, ChristianJäger, Bernd Schünemann et al. (De Gruyter, 2011), pp. 1345–1346.

consult his defence counsel in private prior to or during the first interrogation (Article 6(3)(c) of the Convention) and that the criminal proceedings as a whole were 'rendered unfair' (Article 6(1) of the Convention). Of course, this (above-mentioned) 'legal assessment algorithm arising from the case-law of the ECtHR' is presented merely for illustrative purposes and in a highly simplified form; however, the legal position according to which a violation of the Convention cannot, in principle, be established solely on the basis of a violation of a specific right of the accused, *inter alia*, the right to meet and consult with a defence lawyer, but it is also necessary to assess whether the violation of this specific right of the accused, *in concreto*, rendered the criminal proceedings as a whole unfair, significantly weakens and diminishes the practical significance of this specific right of the accused.[21]

In the case law of the European Court of Human Rights,[22] the accused's right to a defence – *inter alia*, the right to effective legal assistance from a lawyer – as mentioned, is regarded not as a separate, independent or 'isolated' procedural right, but as one of the fundamental conditions of a fair trial (due process). The Convention guarantees this right to the accused from the moment a 'criminal charge' is brought against them (the Convention interprets the term 'criminal charge' autonomously), i.e. from the moment of arrest, questioning or summons to questioning or any other procedural action. Article 6(3)(c) of the Convention combines three separate rights of the accused: (a) the right to defend oneself, (b) the right to defend oneself with the assistance of a lawyer of one's own choosing, and (c) the right to receive free (state-guaranteed) legal aid. The accused's right to defend themselves is very important, but it is not absolute or unlimited. The accused's right to be assisted by a defence counsel ensures the requirement of a fair trial (due process) in several respects; *inter alia*, it protects the accused, as a preventive measure, against errors, arbitrariness, abuse or other improper conduct; it ensures equality between the accused and the prosecuting authorities; it provides support to the accused who is in custody; and it protects the accused from unjustified self-incrimination. The case law of the ECtHR identifies two minimum elements of the accused's right to legal assistance provided by a defence lawyer: (a.) the accused's right to contact a lawyer and consult with them prior to questioning, including the accused's right to give confidential instructions to the lawyer, and (b.) the physical presence of a lawyer

21 Merkevičius, *Gynybos baudžiamajame Procese Pagrindai. Primoji Dalis*, pp. 531–532.

22 European Court of Human Rights, Guide on Article 6 of the European Convention on Human Rights: Right to a fair trial (criminal limb), updated on 31 August 2025, https://ks.echr.coe.int/documents/d/echr-ks/guide_art_6_criminal_eng.

at the defendant's first interview at a police station and at all other interviews of the accused during the pre-trial investigation, including the right of the defence lawyer, whilst present at the interview, to actively assist the defendant and to intervene in the questioning process, if necessary, to protect the defendant's rights. Therefore, if the accused exercises or expresses a wish to exercise the right to have a defence lawyer, the police are essentially obliged to refrain from conducting the questioning or to postpone it until the defence lawyer arrives. It is true, however, that this right of the accused to a defence is not absolute. In exceptional cases, the accused may be prevented from meeting with a defence lawyer at the earliest possible stage of the proceedings, but this must not prejudice the fairness (impartiality) of the criminal proceedings as a whole: (a.) the defendant's meetings and confidential conversations with a lawyer may be restricted only if such a possibility is provided for in national law, (b.) only where there is a serious (compelling) reason, (c.) on a temporary basis, and (d.) taking into account the individual circumstances of the specific case. A 'general' or 'mandatory' prohibition on the accused meeting with a lawyer during the initial questioning is not justified on the grounds of the accused's right to defend themselves with the assistance of a lawyer of their own choosing (even if provided for in national law). In the context of the accused's right to defend themselves with the assistance of a lawyer of their own choosing, the ECtHR specifically highlights the accused's right to remain silent, not to incriminate themselves (not to incriminate themselves), and the duty of state authorities to explain these rights to the accused. Under the Convention, the accused's refusal of a defence counsel (refusal to contact or meet with a defence counsel) is permissible, but only if it is voluntary, as well as 'conscious and informed', made with the accused being aware that he has the right to contact a defence counsel. The legal assistance provided to the accused by a defence lawyer under the Convention must be 'practical and effective': the mere appointment of a lawyer (their presence at the proceedings) does not automatically guarantee the effectiveness of the defence. The principle of 'practical and effective legal defence' also encompasses the accused's right to meet and communicate with a defence lawyer in confidence; however, this confidentiality is not absolute; in exceptional cases (where there are compelling reasons), it may be restricted, but such restrictions must not undermine the fairness of the proceedings as a whole (i.e. the defendant must not be deprived of his right to a fair trial). Due to the independence of the legal profession, the defence function performed by the defence counsel is essentially a matter between the defendant and the lawyer; however, if the defence counsel is manifestly unable to ensure the effectiveness of the defendant's

defence, or if the court's attention is specifically drawn to this, the court must intervene in the performance of the defendant's defence function.

The European Court of Human Rights also considers the right of the defence counsel and the defendant to meet without third parties and to communicate freely through the prism of Article 8 of the Convention,[23] but this aspect is not discussed in greater detail in this article.

16 December 1966 the United Nations General Assembly adopted the International Covenant on Civil and Political Rights,[24] the internal logical structure and underlying principles of which (insofar as the accused's right to defence is concerned) are, if not identical, then at least very close to the text of the Convention. It is true that, although in terms of meaning and purpose, Article 14(3)(d) of the Covenant corresponds to Article 6(3)(c) of the Convention, the text of the Covenant (*expressis verbis*) defines the accused's right to a defence and other procedural rights or guarantees directly related to it in somewhat greater detail than the Convention adopted by the Council of Europe sixteen years ago. For example, Article 14(3)(g) of the Covenant specifically notes the right or guarantee of 'everyone charged with a criminal offence' *not to be compelled to testify against himself or to confess guilt*. In General Comment No. 32[25] on Article 14 of the Covenant, published by the United Nations Human Rights Committee in 2007, attention is drawn to the fact that the right of the accused to defend himself or with the assistance of a lawyer of his own choosing are two separate, independent forms of defence (rights of the accused) which are not mutually exclusive; however, the right to defend oneself (without the participation of a lawyer) is not absolute (para. 37); the importance of a defence counsel's right to meet with their client promptly, without third parties, and to communicate with them under conditions that fully ensure the confidentiality of such communication (para. 34), etc., was emphasised. Paragraph 10 of the commentary states that *the presence or absence of legal assistance often determines whether a person can avail themselves of certain procedures or participate fully in them*. Of course, the mere fact that the text of a legal act

23 Merkevičius, *Gynybos baudžiamajame Procese Pagrindai. Primoji Dalis*, pp. 549–555.

24 United Nations General Assembly, International Covenant on Civil and Political Rights, resolution no. 2200A (XXI). December 16, 1996, https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights. Hereinafter referred to as the Covenant.

25 United Nations Human Rights Committee, International Covenant on Civil and Political Rights. General Comment No. 32, August 23, 2007, https://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=O5ff1FQdLycnTGLImCUQrabcwYcitpvm%2B3%2B9dElTKTv7ejJOg6wCdgAExTaKIqExUd%2B7u3O2DMYtbqyxPiPdYg%3D%3D.

differs or is more detailed does not automatically imply a conclusion regarding a different – greater – legal significance of the Covenant or a significant additional impetus given to the protection of human rights (including the defendant's right to a defence) sixteen years later. In this regard, one should rather note the opposite intention – the concept of human rights developed by the United Nations Human Rights Committee is considerably 'slower, more cautious and more conservative' than that found in the case law of the European Court of Human Rights.

Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 *on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party notified and on the right to communicate with third parties and consular authorities whilst in custody*,[26] Article 2(1) and (3) provide that this Directive applies to *suspects <...> in criminal proceedings from the moment the competent authorities of a Member State <...> competent authorities have, by formal notification or otherwise, informed them that they are suspected <...> of having committed a criminal offence, regardless of whether they are deprived of their liberty*, as well as *persons other than suspects <...> who become suspects during questioning by the police or another law enforcement authority <...>*. Article 3(1) of the Directive emphasises that *Member States shall ensure that suspects <...> have the right to a lawyer at such a time and in such a manner that <...> they can exercise their rights of defence in a practical and effective manner*. Under Article 3(2) of the Directive, suspects must have the right to a lawyer *in any event <...> from the following points in time, whichever is the earliest: (a) before they are questioned by the police, another law enforcement authority or a court; (b) during an investigation or other evidence-gathering measures carried out by the investigating or other competent authorities in accordance with paragraph 3(c), c) without undue delay from the moment of deprivation of liberty, d) when they are summoned to appear before a court having jurisdiction in criminal matters, in good time before their appearance in court*. 'The right to have a lawyer' within the meaning of Article 3(3) of this Directive includes the suspect's: (a) right to meet and communicate with a lawyer in private, including prior to

[26] The European Parliament and the Council of the European Union, Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the Right of Access to a Lawyer in Criminal Proceedings and in European Arrest Warrant Proceedings, and on the Right to Have a Third Party Informed upon Deprivation of Liberty and to Communicate with Third Persons and with Consular Authorities while Deprived of Liberty, Official Journal of the European Union, L 29/1, November 6, 2013, https://eur-lex.europa.eu/legal-content/LT/TXT/?uri=CELEX%3A32013L0048&qid=1771960296259. Hereinafter referred to as Directive 2013/48/EU on the right of access to a lawyer.

questioning by the police, another law enforcement authority or a court; (b) the right to have a lawyer present at their questioning and to have that lawyer participate effectively in it; c) the right to have a lawyer present during investigative or evidence-gathering procedures provided for under national law, where the suspect is required or permitted to participate in such procedures (e.g. line-ups, confrontations, crime reconstructions). Article 4 of Directive 2013/48/EU on the right of access to a lawyer expresses *respect for the confidentiality of communications between suspects* <...> *and their lawyer* <...>, specifying that *such communications include meetings, correspondence, telephone conversations and other forms of communication permitted under national law*.

A procedural aspect that is essentially analogous – namely, the right of a suspect to meet and communicate with their defence lawyer – is also emphasised in other EU directives designed to safeguard a suspect's right of defence: for example, in Article 1(2) and Article 2(1) of Directive 2010/64/EU of 20 October 2010 on the right to interpretation and translation in criminal proceedings,[27] Article 2(1) and Article 4(1) of Directive 2012/13/EU of 22 May 2012 on the right to information in criminal proceedings,[28] Article 2(1) and Article 4(1) of Directive (EU) 2016/800 of 11 May 2016 *on procedural safeguards for children who are suspects or accused persons in criminal proceedings*,[29] Articles 2(1) and (4) and 6(1), Directive (EU) 2016/1919 of 26 October 2016 *on legal aid for suspects and accused persons in criminal proceedings and for persons subject to European arrest warrant procedures*,[30] Article 2(1) and (3). Article 2(2)

27 The European Parliament and the Council of the European Union, Directive 2010/64/EU the European Parliament and of the Council of 20 October 2010 on the Right to Interpretation and Translation in Criminal Proceedings, Official Journal of the European Union, L 280/1, October 26, 2010, https://eur-lex.europa.eu/legal-content/LT/TXT/?uri=CELEX%3A32010L0064&qid=1771960296259. Hereinafter referred to as Directive 2010/64/EU on the right to interpretation.

28 The European Parliament and the Council of the European Union, Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the Right to Information in Criminal Proceedings, Official Journal of the European Union, L 142/1, June 1, 2012, https://eur-lex.europa.eu/legal-content/LT/TXT/?uri=CELEX%3A32012L0013&qid=1771960296259. Hereinafter referred to as Directive 2012/13/EU on the right to information.

29 The European Parliament and the Council of the European Union, Directive (EU) 2016/800 of the European Parliament and of the Council of 11 May 2016 on Procedural Safeguards for Children Who Are Suspects or Accused Persons in Criminal Proceedings, Official Journal of the European Union, L 132/1, May 21, 2016, https://eur-lex.europa.eu/legal-content/LT/TXT/?uri=CELEX%3A32016L0800&qid=1771960296259. Hereinafter referred to as Directive (EU) 2016/800 on procedural safeguards for suspected (accused) children.

30 The European Parliament and the Council of the European Union, Directive (EU) 2016/1919 of the European Parliament and of the Council of 26 October 2016 on Legal Aid for Suspects

of Directive 2010/64/EU on the right to interpretation states that *where necessary to safeguard the fairness of the proceedings, communication between suspects <...> and their defence counsel, directly related to any questioning during the proceedings or to the proceedings themselves, or to the lodging of a complaint or other procedural requirements, shall be interpreted orally*.

In essence, when a suspect is at liberty (not in custody or under arrest), the right of the defence counsel and the defendant to meet without outsiders and to communicate unhindered implies (an expression of *status libertatis* and *status negativus*) the freedom of the defence counsel and the defendant to meet at any place of their choosing, without fear or threat of being followed, observed or otherwise monitored or recorded, to meet in any location, as well as the freedom to communicate, without restriction, surveillance or other forms of control or recording, both directly during the meeting and by all other possible means and methods: verbally, in writing, via electronic means of communication, etc. on any matters relevant both directly to the defence and, more generally, to the suspect or the defence counsel.[31] In the sense of *a positive obligation,* the right of the defence counsel and the suspect to meet without outsiders and to communicate unhindered implies an obligation on the part of the criminal justice authorities – pre-trial investigation, criminal prosecution, and, in the Lithuanian context, particularly officials of criminal intelligence agencies – not only to 'grit their teeth and tolerate' the right of the suspect and his defence counsel to meet without outsiders and to communicate unhindered, but also to 'actively ensure' the effectiveness of this right of defence: not to prohibit, obstruct or restrict in any way, nor to follow, observe or otherwise monitor or record (neither physically nor by using technical means) of either the fact of the meeting between the defence counsel and the suspect, or the content of the conversation or other actions and events that took place during it, nor, in general, of any form of mutual interaction or communication between the defence counsel and the suspect, or the fact and content thereof.[32]

---

and Accused Persons in Criminal Proceedings and for Requested Persons in European Arrest Warrant Proceedings, Official Journal of the European Union. L 297/1, November 4, 2016, https://eur-lex.europa.eu/legal-content/LT/TXT/?uri=CELEX%3A32016L1919&qid=1771960296259. Hereinafter referred to as Directive (EU) 2016/1919 on legal aid for suspects and accused persons.

31 Merkevičius, *Gynybos baudžiamajame Procese Pagrindai. Primoji Dalis*, p. 557.

32 Merkevičius, *Gynybos baudžiamajame Procese Pagrindai. Primoji Dalis*, pp. 516–517, 519; Harald Brenner, *Die strafprozessuale Überwachung des Fernmeldeverkehrs mit Verteidigern: Zugleich ein Beitrag zu den Beweisverboten, auch im Zusammenhang mit neuen Formen der Telekommunikation* (Mohr Siebeck, 1994), pp. 94–95; Mandy Vetter, *Verteidigerkonsultation im*

The right to meet without third parties present and to communicate freely does not mean that the defence lawyer and the defendant may only meet 'without third parties present', and therefore cannot meet, for example, in a public place, nor does it mean that the principle of confidentiality of communication between the defence counsel and the defendant applies only to those meetings between them that *de facto* take place 'without third parties'.[33] The 'right to meet without third parties' and the 'right to communicate without hindrance' are two separate, independent rights of the defence, quite regardless of the fact that they are often exercised together; these rights of the defence counsel and the defendant are not inseparable and do not determine one another; therefore, the defence counsel and the defendant also have the 'right to communicate without interference' when they meet in places or premises where 'outsiders' are present. Any communication between the defence counsel and the defendant must remain confidential, regardless of where it takes place. Both the defence counsel and the criminal justice authorities must ensure confidentiality. As cited, the confidentiality of meetings and conversations between the defence lawyer and the defendant is also specifically highlighted in relevant international legislation and EU directives (e.g. Article 4 of Directive 2013/48/EU on the right of access to a lawyer, Article 6(5) of Directive (EU) 2016/800 on procedural safeguards for suspected (accused) children).

Meetings and conversations between a suspect – particularly one who is detained (in custody) – and their defence counsel, as well as any other form of communication between them (e.g. telephone calls, communication via electronic means, exchange of documents, etc.) are a *conditio sine qua non* for a real and effective (not merely formal or illusory) right to defence, as well as a guarantee of a *'fair trial'*. Any breach of this guarantee – whether by imposing certain physical barriers that generally deprive the parties of the opportunity to communicate, by imposing formal conditions or restrictions that curtail freedom of communication, or by formally and artificially refraining from restricting the very possibility of communication, but by covertly monitoring, controlling and recording its content – not only is the functionality of contact between the suspect and the defence counsel compromised, but the exercise of numerous other procedural rights of the defence counsel and the defendant is also unjustifiably impeded, for example: (a.) it hinders the creation of an

Ermittlungsverfahren Eine rechtsvergleichende Untersuchung zum deutschen und englischen Strafverfahrensrecht im Lichte der Europäischen Menschenrechtskonvention, Series S: Strafrechtliche Forschungsberichte, Vol. 160 (Duncker & Humblot), 2018, p. 156.

33 Merkevičius, *Gynybos baudžiamajame Procese Pagrindai. Primoji Dalis*, pp. 568–569.

environment of mutual trust between the defence lawyer and the defendant, which is essential for the effectiveness of the defence; (b.) the defence lawyer and the suspect are forced to exercise their right to defence in an artificially separated manner from one another: the defence lawyer must make do with fragmentary factual information received from the suspect, whilst the suspect must make do with legal advice given 'between the lines' or 'half-heartedly', thereby negating the fundamental purpose of the defence counsel's participation in criminal proceedings – to assist and advise the suspect on all defence matters of concern to him, (c.) the procedural capabilities of the defence counsel as an independent party to the criminal proceedings are unreasonably restricted, for example, to independently gather factual data relevant to the defence (to speak with persons who possess information beneficial to the defence, to obtain documents, etc.), whilst the suspect lacks a defence counsel capable of effectively performing their duties or exercising their rights, (d.) a detained (arrested) suspect, who is under surveillance and control, is unable, for fear of a negative reaction from the criminal authorities and possible repercussions, to properly exercise their right to appeal against unlawful procedural actions and decisions of the criminal prosecution or judicial authorities.[34]

As mentioned, from a linguistic perspective, Article 31(6) of the Constitution guarantees a suspect the 'right to have a lawyer' from the moment of their arrest or initial questioning. Although not *expressly* stated in *the Constitution*, there is not the slightest doubt that 'the opportunity to meet with a lawyer without third parties present and to communicate without hindrance' is one of the essential and indispensable elements of the content of the suspect's 'right to have a lawyer'. This conclusion follows not only from the substance and objectives of the 'right to defend oneself with the assistance of a lawyer' (as this right is defined in the doctrine of criminal procedure law), but also, formally, from the EU directives designed to ensure legal aid: Article 3(3) of Directive 2013/48/EU on the right of access to a lawyer and Article 6(4) of Directive (EU) 2016/800 on procedural safeguards for suspected (accused) children state that the (accused) 'right to a lawyer' ('legal assistance') consists of: (a) the right to meet and communicate with the lawyer representing them in private, including prior to questioning by the police, another law enforcement authority or a court; (b) the right to have their lawyer present at their questioning and to have that lawyer participate effectively in it, c) the right to request that their lawyer be present during such investigative or evidence-gathering procedures in which the suspect (defendant)

34 Merkevičius, *Gynybos baudžiamajame Procese Pagrindai. Primoji Dalis*, pp. 522–524.

is required or permitted to participate: i) line-ups, ii) confrontations, and iii) crime reconstructions.

In this context, it is worth noting the significance and importance of explaining procedural rights and options. Article 3(1) of Directive 2012/13/EU on the right to information states that information on procedural rights such as, *inter alia*, 'the right to have a lawyer' and 'the right to free legal advice' must be provided to suspects 'without delay' so that these rights can be exercised 'effectively'. Under Article 3(2) of that Directive, information on these rights must be provided to the suspect orally or in writing in 'plain and easily understandable' language, taking into account the specific needs of vulnerable suspects, and where the suspect is detained or in custody, Article 4(1) of Directive 2012/13/EU on the right to information requires that such a suspect be provided 'without delay' with a 'written statement of rights' (a suspect who has been detained (or arrested) must be given the opportunity to read this written statement and keep it for the entire duration of the deprivation of liberty).

Article 9(1) of Directive 2013/48/EU on the right of access to a lawyer states that *without prejudice to national law under which the presence or assistance of a lawyer is mandatory*, where the right of access to a lawyer is waived: (a) the suspect must be provided, in writing or orally, with *sufficiently clear information in plain and easily understandable language* regarding the content of this right and the possible consequences of waiving it; and (b) it must be ensured that the right (*inter alia*, the right to a lawyer) is waived voluntarily and unequivocally. The suspect must be informed of the possibility of subsequently revoking the waiver of rights at any stage of the criminal proceedings; such revocation takes effect from the moment it is made (Article 9(3)).

In summary, the effectiveness of the right of the defence lawyer and the suspect to meet without third parties present and to communicate freely implies the following key procedural principles: (i.) a person acquires this right from the moment of their 'arrest or first interrogation' (from this moment in Lithuania, the person also acquires the procedural status of a suspect), depending on which of these procedural situations actually occurs first, (ii.) officials of the pre-trial investigation (criminal prosecution) authorities must explain this right to the suspect at the moment when the person acquires this right, i.e. from the moment of their actual arrest or before the first interrogation, regardless of where any of these actions actually take place (e.g. regardless of whether the person is arrested, say, in a forest or at night), (iii.) both the suspect and their defence counsel have the right to meet in private and communicate without hindrance (this is a right intended for the defence as a procedural function), so

this right may be exercised by and must be guaranteed to either of them (both of them), (iv.) criminal authorities – pre-trial investigation, criminal prosecution and criminal intelligence – have a 'duty to actively ensure' the reality and effectiveness of this right of the defence counsel and the suspect, *inter alia*, by creating the necessary and sufficient conditions for the exercise of this right of defence.

In Lithuania, the right to meet without third parties and to communicate without hindrance (as mentioned, these are essentially two separate procedural rights, but in Lithuanian criminal procedure doctrine they are usually discussed together) is set out in the Code of Criminal Procedure as rights of both the defence counsel and the suspect: (a.) Article 48(1)(3) of the Code of Criminal Procedure states in general terms that a defence counsel has the right to meet with the suspect without third parties present and to communicate without hindrance (this provision also notes that 'the number and duration of meetings with a detained or arrested suspect are not limited'); under Article 48(1)(2) of the Code of Criminal Procedure, the defence counsel also has the right to meet with the suspect without third parties present 'before questioning' and 'before the court hearing', and (b.) Article 50(1) of the Code of Criminal Procedure essentially recognises the same right (as set out in Article 48(1)(2) of the Code of Criminal Procedure) for a 'detained suspect' (it is difficult to understand why only a 'detained' suspect): 'a detained suspect shall be guaranteed the opportunity to meet with a defence lawyer in private prior to the first interrogation'. This legal provision is essentially repeated in Article 140(9) of the Code of Criminal Procedure: *a detained person shall be guaranteed the opportunity to meet with a defence lawyer prior to questioning* [it would appear that this applies not only to the 'first' questioning – author's note*], without the presence of third parties*.

In the legal context under discussion, attention must also be drawn to the Law on the Bar, which, on the one hand, defines the 'right to meet and communicate freely' more broadly than the Code of Criminal Procedure: whereas the Code of Criminal Procedure refers to 'formal procedural figures', formal participants in the proceedings – the 'defence counsel' (Articles 17, 47 and 50 of the Code of Criminal Procedure) and the 'suspect' (Article 21 of the Code of Criminal Procedure), Article 45(1) of the Law on the Bar prohibits the obstruction of a 'lawyer' (Articles 17 and 18 of the Law on the Bar) from communicating or meeting with a 'client' without third parties (Article 48(1) of the Law on Advocacy). Thus, the scope of the 'right to meet and communicate without hindrance' is not limited to criminal proceedings alone. On the other hand, Article 45(1) of the Law on the Bar emphasises not so much this right as the corresponding duty of

public authorities – it 'prohibits the obstruction' of a lawyer's communication or private meetings with a client.

In ensuring the 'right to have a lawyer' guaranteed to the suspect under Article 31(6) of the Constitution – and thus also the 'right to meet with a lawyer without third parties and to communicate without hindrance' – 'from the moment of his arrest or first interrogation', the first and third sentences of Article 50(1) of the Code of Criminal Procedure set out three significant procedural aspects: (i.) the pre-trial investigation officer, the prosecutor and the court must explain to the suspect his 'right to have a defence counsel' – and thus (one might even say, first and foremost) his 'right to meet with a defence counsel without third parties present and to communicate freely' – 'from the moment of arrest or the first interrogation', (ii.) to provide the suspect with the opportunity to exercise this right (which must undoubtedly be real and effective) and (iii.) to formally document in the proceedings that the suspect has been informed of his right to a defence lawyer – *regarding the suspect's <...> request for a defence lawyer or the defence lawyer's refusal to draw up a record*.

It is true that the second sentence of Article 50(1) of the Code of Criminal Procedure has, for some reason, overlooked the fact that, under Article 31(6) of the Constitution, a suspect has the right to a lawyer not only 'from the moment of the first interrogation' but also 'from the moment of arrest': this legal provision (the second sentence of Article 50(1) of the Code of Criminal Procedure) states that 'a detained suspect shall be guaranteed the opportunity to meet with a defence lawyer in private prior to the first interrogation'. The term 'before the first interrogation' (which is particularly broad in its formulation) is not specified in detail. Thus, for the person for whom the 'right to have a lawyer' is most necessary precisely 'from the moment of detention' – the detained suspect – the second sentence of Article 50(1) of the Code of Criminal Procedure, for some reason, guarantees only the right to meet with a defence lawyer 'before the first interrogation'. There is no doubt that the procedural situation defined by the phrase 'before the first interrogation' is far from identical to the procedural situation defined by the phrase 'from the moment of arrest'. Furthermore, the second sentence of Article 50(1) of the Code of Criminal Procedure appears to have overlooked not only Article 31(6) of the Constitution, but also Directive 2013/48/EU on the right of access to a lawyer, Article 3(1) of which explicitly states that the suspect must have the 'right to a lawyer' *at such a time and in such a manner as to enable him or her to exercise his or her right of defence in a practical and effective manner*, whilst Article 3(2) *expressly* specifies that a suspect must have the 'right to a lawyer' 'without undue delay', but in any

event (whichever occurs first): *(a) before being questioned by the police, by other law enforcement authorities or in court, (b.) during an investigation or other evidence-gathering measures carried out by the investigating or other competent authorities in accordance with paragraph 3(c), (c.) without undue delay from the moment of deprivation of liberty* <...>. Article 3(4) of Directive 2013/48/EU on the right of access to a lawyer also emphasises *the need to ensure that suspects who are deprived of their liberty are able to exercise their right of access to a lawyer effectively, unless they have waived that right in accordance with Article 9 of Directive 2013/48/EU*.

Thus, as regards the right of a detained suspect to meet in private and communicate freely with their defence lawyer 'from the moment of actual detention', the Code of Criminal Procedure implements Directive 2013/48/EU on the right of access to a lawyer (and also corresponds to Article 31(6) of the Constitution) insufficiently precisely, and this – already 'at the level of the law' – undermines the reality and effectiveness of this right of defence (this is unacceptable and impermissible, given the particular importance of the right of a detained (arrested) suspect to meet with a defence lawyer without third parties present and to communicate without hindrance).

As cited, the first and third sentences of Article 50(1) of the Code of Criminal Procedure stipulate, *inter alia*, that the pre-trial investigation officer, the prosecutor and the court must explain to the suspect his *right to have a defence counsel from the moment of detention or the first interrogation and a record shall be drawn up regarding the suspect's request for a defence counsel or his refusal of a defence counsel*. It follows from the 'Protocol on the Explanation of Rights Regarding a Defence Counsel', approved by Order No.[35] of the Prosecutor General of the Republic of Lithuania,[36] that at this *initial stage of a person's involvement in criminal proceedings as a suspect*, the suspect's rights are explained in accordance with Articles 44 and 50 of the Code of Criminal Procedure, whilst the protocol itself merely states, *inter alia*, that every person suspected or accused of a criminal offence *has the right to a defence counsel from the moment of arrest or the first interrogation*. There is not a single word in the 'Protocol on the Explanation of Rights Regarding a Defence Counsel' about the suspect's, or specifically the detained suspect's, *right to meet with a defence counsel without outsiders and to communicate without hindrance*.

35 Prosecutor General of the Republic of Lithuania, Order on the Approval of Forms of Criminal Procedure Documents, No. I-288, December 29, 2014, TAR, No. 20097, December 30, 2014.

36 Hereinafter referred to as the Prosecutor General.

It should be noted that, in an 'Explanatory Note on the Implementation of Article 51(1)(10) of the Code of Criminal Procedure' which was not made public, the Prosecutor General explained to prosecutors that, since <...> *Article 3(2)(c) of Directive 2013/48/EU 'on the right of access to a lawyer <...>' does not lay down an 'unconditional requirement to ensure the right of a detained suspect to a defence from the very moment of his actual detention'*, therefore, *in cases where it is not practically possible to do so at the time of the suspect's arrest, the active measures referred to in Article 51(3) of the Code of Criminal Procedure, aimed at ensuring the participation of a defence lawyer in the proceedings, must be taken immediately after the report on the suspect's arrest has been drawn up*. It sounds smooth enough, but *the devil, as always, is in the detail*: The Code of Criminal Procedure does not specifically stipulate when the report on a person's temporary detention must be drawn up – under Article 140(7) of the Code of Criminal Procedure, the report on temporary detention must be drawn up by the pre-trial investigation officer or the prosecutor 'as soon as possible'.

Thus, although Article 31(6) of the Constitution and Article 3(2)(c) of Directive 2013/48/EU on the right of access to a lawyer, and the Code of Criminal Procedure itself repeatedly emphasises the right of a suspect, taken individually, and of a detained suspect, to meet with a defence lawyer in private and to communicate without hindrance 'from the moment of detention', however, at the initial stage, when a person is formally involved in criminal proceedings as a suspect, and even where they are detained, the suspect (including a detained suspect) is not informed 'clearly and comprehensibly' (as stated in Article 3(2) of Directive 2012/13/EU on the right to information, 'in plain and easily understandable language, taking into account the specific needs of vulnerable suspects or accused persons') of their 'right to consult a lawyer in private and to communicate freely'. It is not sufficient to merely explain rights formulated in general (abstract) terms – *inter alia*, the right 'to have a lawyer from the moment of arrest or the first questioning' or the right 'to choose and call in a lawyer of one's own choosing' and so on. Thus, the reality and effectiveness of the suspect's, including the detained suspect's, *the right to meet with a defence lawyer without outsiders and to communicate unhindered from the moment of arrest* in Lithuania essentially depends solely on the suspect's own individual knowledge and, of course, the will of the criminal justice authorities. In the practice of criminal proceedings, immediately after a person is actually detained, they are not usually informed of their *right to meet with a defence lawyer without the presence of third parties and to communicate freely*, nor is the opportunity to exercise this right in a real and effective manner ensured.

Although, from the perspective of the right to have a defence lawyer – including, *inter alia*, the right to meet with a defence lawyer in private and to communicate without hindrance – this is already a 'long overdue clarification', under the Code of Criminal Procedure, the rights of a suspect – regardless of whether they are in custody or not – are explained to them prior to the suspect's questioning.

If the suspect is at liberty (summoned for questioning by summons or other means), the time of the questioning – and thus the time for explaining the suspect's rights – is freely chosen by the pre-trial investigation officer or the prosecutor. In this regard, Article 188(1) and (2) of the Code of Criminal Procedure stipulate that a suspect must be questioned at least once during the pre-trial investigation before the indictment is drawn up and must always be questioned before a preventive measure is imposed on them. If the suspect is detained, the timing of their questioning depends on the grounds for detention: (i.) if the suspect is detained *caught in the act of committing a criminal offence or immediately after its commission* (Article 140(1) of the Code of Criminal Procedure), he must be questioned no later than within 24 hours, calculated from the time the detained person is brought to the pre-trial investigation authority, the public prosecutor's office or the place of temporary detention (Article 140(8) of the Code of Criminal Procedure), (ii.) if the suspect is detained *not having been caught at the scene of the offence or immediately after its commission* (Article 140(2) of the Code of Criminal Procedure), he must be questioned 'without delay' (Article 140(8) of the Code of Criminal Procedure). The detained person, depending on the grounds for their detention, is 'served with a signed copy' of the 'report on temporary detention' (Article 140(7) of the Code of Criminal Procedure) or (and) the 'decision to impose temporary detention' (Articles 140(3) and (5) of the Code of Criminal Procedure) or copies of these documents (incidentally, the report on temporary detention or a copy thereof shall also be served on the defence counsel – Article 140(7) of the Code of Criminal Procedure).

Article 187(1) of the Code of Criminal Procedure stipulates that 'prior to the first interrogation', the suspect must be 'served with a signed copy' of a 'notice of suspicion' or 'the prosecutor's decision to designate the suspect', which must, *inter alia*, 'set out the suspect's rights'. Pursuant to Article 188(3) of the Code of Criminal Procedure, 'before commencing the suspect's questioning', the pre-trial investigation officer, the prosecutor or the pre-trial investigation judge shall explain to the suspect his right to remain silent and/or to refuse to give evidence regarding a criminal offence he may have committed. As cited,

Article 50(1) and Article 140(9) of the Code of Criminal Procedure also refer to the right of a 'detained suspect' (although the criminal procedure law itself does not use the word 'right', but 'opportunity') to 'meet with a defence lawyer in private prior to the first interrogation'.

The form of the 'Protocol on the Temporary Detention of a Suspect', approved by Order of the Prosecutor General No.,[37] does not contain a section dedicated to 'the rights of the detained person' (i.e. the protocol for temporary detention does not specify this, and consequently – by serving the "protocol for temporary detention" on the detainee – his rights as a detained suspect are not explained to him),[38] and Article 140 of the Code of Criminal Procedure does not oblige the pre-trial investigation officer or the prosecutor to explain the detainee's rights to him separately – either orally or in writing – regardless of the fact that Article 140 of the Code of Criminal Procedure grants the detained person a number of significant rights relating to detention (e.g. the right to challenge the lawfulness of the temporary detention before a pre-trial investigation judge – Article 140(11) of the Code of Criminal Procedure).

The forms for the 'Notice of Suspicion' and the 'Decision to Designate as a Suspect', approved by Order of the Prosecutor General No.,[39] contain (in the relevant sections) a verbatim reproduction of Article 21(4) of the Code of Criminal Procedure, *inter alia*, the abstract right of the suspect 'to have a defence counsel from the moment of arrest or the first interrogation' is included. The 'right to meet with a defence counsel without third parties present and to communicate without hindrance' is neither singled out nor highlighted.

The 'Protocol on the Explanation of Rights to the Suspect', approved by the Order of the Prosecutor General,[40] again contains only an abstract, formal statement that *the suspect has been informed of the rights provided for in Article 21(4) of the Code of Criminal Procedure*, whilst the 'Annex to the Protocol on the Explanation of Rights to the Suspect',[41] which is physically handed to the

37 Order No. I-288; Prosecutor General of the Republic of Lithuania. Order on the Order of the Prosecutor General of the Republic of Lithuania of 29 December 2014 no. I-288 on the Approval of Forms of Criminal Procedure Documents, No. I-79, February 24, 2022, TAR, No. 03502, February 24, 2022.

38 Merkevičius, *Gynybos baudžiamajame Procese Pagrindai. Primoji Dalis*, p. 615.

39 Order No. I-288; Prosecutor General of the Republic of Lithuania, Order on the Order of the Prosecutor General of the Republic of Lithuania No. 29 December 2014 no. I-288 on the Approval of Forms of Criminal Procedure Documents, No. I-243. August 27, 2019, TAR, No. 13523, August 27, 2019.

40 Order No. I-288.

41 Order No. I-288; Order No. I-243; Prosecutor General of the Republic of Lithuania. Order on the Order of the Prosecutor General of the Republic of Lithuania of 29 December 2014 no. I-288

suspect prior to questioning, states, *inter alia*, that *the suspect has the right to defend himself or herself or through a defence counsel of his or her choice. This right is guaranteed from the moment of detention or the first questioning.* <...> *A suspect who has been detained or arrested has the right to meet with a defence counsel without the presence of third parties. The number and duration of meetings between the suspect and their defence counsel, taking place during the working hours set by the temporary detention facility or the institution carrying out the arrest, may not be restricted*. The 'Appendix to the Protocol on the Explanation of Rights to a Juvenile Suspect'[42] states, *inter alia*, that *the defence counsel shall defend the juvenile suspect from the moment of detention or the first interrogation. A juvenile suspect has the right to have a defence counsel of his or her own choosing or one chosen by a legal representative.* <...> *A juvenile suspect who has been detained or arrested has the right to meet with a defence counsel without the presence of third parties. The number and duration of meetings between a juvenile suspect and his or her defence counsel, taking place during the working hours set by the temporary detention facility or the institution carrying out the arrest, may not be restricted*.

Thus, the suspect's 'right to meet with a defence lawyer' – albeit only formally and superficially – is first mentioned in Lithuania only in the 'Annex to the Protocol on the Explanation of Rights to the Suspect', which is physically handed to the suspect (as a separate document) prior to questioning.

Article 3(1) of Directive 2012/13/EU on the right to information states, *inter alia*, that suspects must be 'provided with information without delay' at least regarding the following procedural rights applicable under national law, so that those rights 'can be effectively exercised': *(a) the right to have a lawyer; (b) the right to free legal advice and the conditions for obtaining such advice* <...>. This Directive applies from the moment *the competent authorities inform persons that they are suspected* <...> *of having committed a criminal offence until the conclusion of the proceedings, i.e. until the question of whether the suspect* <...>

on the Approval of Forms of Criminal Procedure Documents. No. I-107. April 28, 2020. TAR. No. 08898. April 28, 2020; Prosecutor General of the Republic of Lithuania, Order on the Order of the Prosecutor General of the Republic of Lithuania of 29 December 2014 no. I-288 on the Approval of Forms of Criminal Procedure Documents, No. I-80, April 17, 2024, TAR, No. 07073, April 17, 2024.

42 Prosecutor General of the Republic of Lithuania, Order on the Approval of the Form of a Criminal Procedure Document, No. I-219, July 19, 2019, TAR, No. 11987, July 22, 2019; Prosecutor General of the Republic of Lithuania, Order on the Order of the Prosecutor General of the Republic of Lithuania of 19 July 2019 no. I-219 on the Approval of the Form of a Criminal Procedure Document, No. I-71, April 3, 2024, TAR, No. 06215, April 3, 2024.

has committed a criminal offence has been finally resolved, <...> (Article 2(1)). Suspects who are detained or arrested must 'be provided immediately with a written statement of their rights', which they have 'the right to retain for the entire duration of their deprivation of liberty' (Article 4(1)). As already mentioned, under Article 3(2) of Directive 2012/13/EU on the right to information, this information must be provided to the suspect *orally or in writing in plain and easily understandable language, taking into account the specific needs of vulnerable suspects* <...>.

Thus, Directive 2012/13/EU on the right to information requires that the (most important) procedural rights available to a suspect (particularly a suspect who has been detained) be 'explained' – 'to provide information' about them – in such a way that the suspect is able to 'effectively' exercise these rights, *inter alia*, so that (a.) the suspect understands (is aware of) what procedural rights he has, and (b.) the detained (arrested) suspect should also have a written document enabling them to read and recall their procedural rights at any time. 'Explanation of rights' ('provision of information on rights') under Directive 2012/13/EU on the right to information is focused on the 'outcome' (the suspect's knowledge) rather than the 'process' (the drafting of a document and its provision to the suspect to 'read' or 'have').

In the context of the national legal framework and Directive 2012/13/EU on the right to information, it is necessary, first and foremost, to note that the 'explanation' of rights to the suspect, particularly a detained suspect (namely 'explanation', i.e. the provision of such information and the manner of its presentation in the proceedings that ensures understanding and awareness), is such a crucial element of the suspect's procedural status (procedural subjectivity) that the procedure for explaining rights to the suspect and the mechanism for ensuring the suspect's right to know (to be informed) were not regulated by law at all, or were established in a legal act of relatively low legal force compared to the Code of Criminal Procedure. Put simply, the explanation of a suspect's rights must be enshrined in the Code of Criminal Procedure as one of the most important duties of the criminal prosecution authorities and the courts.

Unfortunately, the Code of Criminal Procedure does not explicitly state that a suspect's procedural rights – including the right to meet with a defence lawyer in private and to communicate without hindrance – must be 'explained' to the suspect from the moment of their arrest or (and) prior to questioning. As cited, at the time of arrest or immediately thereafter, the suspect is generally not 'informed' of his rights as a detained suspect (Article 140 of the Code of

Criminal Procedure), whilst Article 187(1) of the Code of Criminal Procedure stipulates that 'prior to the first interrogation', the suspect must be 'served with a signed copy' of a 'notice of suspicion' or a 'prosecutor's decision to designate the suspect', which must 'set out the suspect's rights'; Article 188(3) of the Code of Criminal Procedure provides that, before commencing the questioning of the suspect, the pre-trial investigation officer, the prosecutor or the pre-trial investigation judge shall explain to the suspect his 'right to remain silent and/or to refuse to give evidence regarding a criminal offence he may have committed'.

Unless we consider an 'interpretation' of the suspect's right to meet with a defence lawyer without third parties present and to communicate freely – an interpretation commensurate with the importance of this right – to apply in both cases: from the moment of arrest and prior to the first interrogation – we would be treating an abstract procedural legal provision which establishes the 'general duty' of the pre-trial investigation officer, the prosecutor and the judge to explain 'the procedural rights of the participants in the proceedings and to ensure the possibility of exercising them' (Article 45 of the Code of Criminal Procedure).[43] However, even in this case, we must acknowledge that the Code of Criminal Procedure does not ensure the effectiveness of this 'explanation' of the right: neither Article 45 of the Code of Criminal Procedure nor any other provision of the Code of Criminal Procedure stipulates that a pre-trial investigation officer, having explained the suspect's procedural rights to him, must draw up a procedural document such as a 'protocol on the explanation of rights to the suspect', nor is the suspect required to be served with an 'annex to the protocol on the explanation of the suspect's rights' (it would be naive even to consider the notion of 'satisfaction that the suspect has understood the substance of the rights explained to him'). After all, the Code of Criminal Procedure does not provide that the 'Appendix to the Protocol on the Explanation of Rights to the Suspect', which specifically mentions the suspect's right 'to meet with a defence lawyer without third parties present', must be served on the suspect not from the moment of his arrest (or immediately after arrest), but only before the first interrogation.

It appears that the failure to provide for a comprehensive and clear explanation of a suspect's rights in the Code of Criminal Procedure, in particular the failure to link the explanation of a suspect's rights to the moment of their arrest, is based on an inaccurate interpretation of Article 31(6) of the Constitution and the relevant EU directives – Directive 2012/13/EU on the right to information,

43 Merkevičius, *Gynybos baudžiamajame Procese Pagrindai. Primoji Dalis*, pp. 595–597.

Directive 2013/48/EU on the right of access to a lawyer, and Directive (EU) 2016/800 on procedural safeguards for suspected (accused) children – (or on the disregard of these EU legal acts): The explanatory notes of the Ministry of Justice of the Republic of Lithuania on the implementation of all these directives formally state that the provisions of the current Code of Criminal Procedure fully comply with the standard for explaining rights to suspects as defined in the directives (the directives have been implemented correctly *from the outset*). Unfortunately, the reality is still quite the opposite – the 'procedural form of informing a suspect (particularly a detained suspect) of their rights' as defined in the Code of Criminal Procedure and currently hardly meets the requirements arising from the aforementioned EU directives and Article 31(6) of the Constitution.

Secondly, although the 'Annex to the Protocol on the Explanation of Rights to a Suspect',[44] which is provided to the suspect prior to his or her questioning as a suspect, states, *inter alia*, that *pursuant to <...> Article 21(4) of the Code of Criminal Procedure, the suspect has the following rights: <...> 2. <...> a suspect who has been detained or arrested has the right to meet with a defence lawyer without the presence of third parties. The number and duration of meetings between the suspect and his defence lawyer, taking place during the working hours set by the temporary detention facility or the institution carrying out the arrest, may not be restricted*, however, even such an explanation of the suspect's rights is insufficient, as it does not reveal the full content of this right of the suspect and his defence counsel (without denying that 'such a text' is, of course, better than 'no text at all').

On the one hand, although, as cited, the 'Annex to the Protocol on the Explanation of Rights to the Suspect' approved by the Prosecutor General states that the rights explained in this annex are those to which the suspect is entitled *pursuant to <...> Article 21(4) of the Code of Criminal Procedure <...>*, in fact, Article 21(4) of the Code of Criminal Procedure does not explicitly mention such a right of the suspect as 'the right of a detained or arrested suspect to meet with a defence counsel without the presence of third parties'. Article 21(4) of the Code of Criminal Procedure merely refers in abstract terms to the suspect's 'general' 'right to have a defence counsel from the moment of detention or the first interrogation'. Nor does Article 22(3) of the Code of Criminal Procedure, which sets out the rights of the accused, *expressly* mention 'the right to

44 Order No. I-288; Order No. I-243; Order No. I-107; Order No. I-80.

meet with a defence counsel without the presence of third parties and to communicate without hindrance'.

On the other hand, the suspect's 'right to meet with a defence lawyer without the presence of third parties and to communicate freely' is presented in the 'Appendix to the Protocol on the Explanation of Rights to the Suspect' in a clearly too narrow manner – it states *expressis verbis* only that a 'detained (arrested) suspect' has the right 'to meet with a defence lawyer without the presence of third parties'. Thus, the 'Appendix to the Protocol on the Explanation of Rights to the Suspect' has, for some reason, omitted the suspect's – incidentally, not just the detained (arrested) suspect's – right to 'communicate without hindrance', and the legal concept of 'to see' is not identical to the legal concept of 'to meet'.

After all, Article 48(1)(3) of the Code of Criminal Procedure states that the number and duration of a defence counsel's 'meetings with a detained or arrested suspect or accused person are not limited', whereas the Prosecutor General writes in the 'Annex to the Protocol on the Explanation of Rights to the Suspect' that the number and duration may not be restricted only to those meetings between the suspect and his defence counsel which take place 'during the working hours established by the temporary detention facility or the institution carrying out the arrest'. Without questioning the substance of the matter, it cannot be overlooked that the Prosecutor General is undoubtedly not the constitutional body which, by his order, can amend the Code of Criminal Procedure or restrict its application.

Thus, as regards the interpretation of a suspect's (particularly a detained suspect's) 'right to meet in private and communicate freely' with a defence lawyer 'from the moment of actual detention', the Code of Criminal Procedure and the legal acts approved by orders of the Prosecutor General implement Directive 2013/48/EU on the right of access to a lawyer and Directive 2012/13/EU on the right to information (and also corresponds to Article 31(6) of the Constitution) are not sufficiently precise, and this, in turn, significantly undermines the reality and effectiveness of this right of defence. Although the Code of Criminal Procedure formally emphasises on several occasions the right of a suspect, and specifically a detained suspect, to meet with a defence lawyer without third parties present and to communicate unhindered 'prior to questioning', nevertheless, the legal regulation of the right of the defence counsel and the suspect to meet without outsiders and to communicate unhindered 'before questioning' is not sufficiently comprehensive, consistent and uniform to adequately ensure the effectiveness of this right: The Code of Criminal Procedure does not establish a procedure for the interpretation, implementation and safeguarding of this right; different and

ambiguous legal concepts are used, and different aspects of the content of this right are emphasised, and so on. Consequently, the reality and effectiveness of a suspect's (particularly a detained or arrested suspect's) right to meet with a defence lawyer without outsiders and to communicate unhindered 'prior to questioning' once again essentially depends on the suspect's own individual awareness and the will of the criminal justice authorities.

In addition to the 'general' right of the defence counsel and the suspect to meet without third parties and to communicate freely, the content and specific provisions relating to the exercise of this right when the suspect is detained (in custody) can be found at The Code of Criminal Procedure also sets out certain other aspects of the 'right to communicate without hindrance' between the defence counsel and the suspect. For example, Article 154(7) of the Code of Criminal Procedure identifies a specific form of communication between the defence counsel and the suspect – communication via electronic means – and prohibits the interception of conversations between the defence counsel and the suspect transmitted via electronic communications networks, recording them, monitoring other information transmitted between them via electronic communications networks, or recording and storing such information. Article 44(8) of the Code of Criminal Procedure formulates this right even more broadly and considers it 'the right of every person suspected of having committed a criminal offence <...>': *it is prohibited to monitor the communications of the suspect, <...> and their defence counsel – meetings, correspondence, telephone conversations or other forms of communication*. Article 45(2) of the Code of Criminal Procedure establishes a procedural institution that is quite rare ('exceptional') in Lithuanian criminal proceedings – 'exclusion of evidence' ('inadmissibility of evidence'): 'information regarding a meeting or communication between a lawyer and their client may not be used as evidence'. Relevant EU directives also address (in greater detail than discussed so far) the suspect's right to meet with a defence lawyer without third parties present and to communicate without hindrance: Article 4 of Directive 2013/48/EU on the right of access to a lawyer and Article 6(5) of Directive (EU) 2016/800 on procedural safeguards for suspected (accused) children state that a suspect's communication with a lawyer includes 'meetings, correspondence, telephone conversations and other forms of communication permitted under national law' and that respect is shown for the confidentiality of communications between the suspect and their lawyer.

It is also important to note that in Lithuania, both the defence lawyer and the suspect – and, in certain cases, a suspect who has been detained – have

the right to meet without the presence of third parties and to communicate without hindrance (Article 48(1)(2) and (3) of the Code of Criminal Procedure, Article 50(1) and Article 140(9)), as well as various prohibitions on monitoring and recording meetings and communications between the suspect and the defence counsel (Article 44(8) and Article 154(7) of the Code of Criminal Procedure, and Article 45(1) of the Law on the Bar). The Code of Criminal Procedure and the Law on the Bar are formulated in absolute and categorical terms, with no provision for any reservations or exceptions, which means that the Code of Criminal Procedure and the Law on the Bar do not grant or leave any 'legitimate scope for the criminal justice authorities' – to the pre-trial investigation, criminal prosecution and criminal intelligence authorities – to prohibit, obstruct, monitor or in any other way control and record meetings between a defence counsel and a suspect, regardless of whether the suspect is at liberty or in custody (detained).[45]

Notwithstanding the provisions enshrined in the cited provisions of the Code of Criminal Procedure and the Law on the Bar – albeit unenforced and insufficient, yet seem to be quite clear and specific legal regulations (of course, to the extent that such legal regulation exists at all), which, among other things, as mentioned, are formulated in absolute and categorical terms, making no provision for any reservations or exceptions, in everyday legal practice and sometimes various obstacles are deliberately created to the effective possibility for a suspect – especially one who is detained (in custody) – to meet with their defence counsel without outsiders and to communicate unhindered. A few more vivid illustrations of this follow.

Firstly, neither the Code of Criminal Procedure nor any other legislation in force in Lithuania specifies how a lawyer, called upon by a detained (arrested) suspect or their relatives, may 'join the criminal proceedings (pre-trial investigation)' or at what specific procedural stage he becomes a formal party to the proceedings – the suspect's defence counsel – possessing the rights of a 'defence counsel', including the right to meet with the suspect without third parties present and to communicate freely. Under Article 48(1) of the Law on the Bar, in Lithuania a client and a lawyer 'agree on legal services by signing a contract' (this is also noted in the Lithuanian Code of Ethics for Lawyers[46]); a verbal agreement or instruction has no legal force in Lithuania. Upon signing an

45 Merkevičius, *Gynybos baudžiamajame Procese Pagrindai. Primoji Dalis*, pp. 519–520.

46 Minister of Justice of the Republic of Lithuania, Order on the Publication of the Code of Ethics for Lithuanian Lawyers. Code of Ethics, No. 1R-133, April 22, 2016, TAR, No. 10280, April 22, 2016. Hereinafter referred to as the Code of Ethics for Lawyers or AEK.

agreement for legal services, the lawyer must notify the state criminal proceedings authority responsible for the specific criminal proceedings of the mandate to defend a specific person in those proceedings – the pre-trial investigation officer conducting the pre-trial investigation or the prosecutor organising that investigation. Unfortunately, neither the Code of Criminal Procedure nor the Law on the Bar, nor the Code of Ethics for Lawyers specify how a lawyer chosen and invited by the suspect must 'formally join' the criminal proceedings as the suspect's defence counsel, and from what procedural point the lawyer becomes a formal party to the criminal proceedings – the suspect's defence counsel. Article 49(1) of the Law on the Bar states that *when performing duties under an agreement or appointment, a lawyer shall submit* <...> *a lawyer's mandate in criminal proceedings* <...>. Under Article 68 of the Statute of the Lithuanian Bar Association, *a lawyer has the right to complete and submit a lawyer's order once a contract for the provision of legal assistance has entered into force*. This legal regulation implies the general legal conclusion that the 'solicitor's order' issued by the solicitor expresses the mandate received and accepted by the solicitor to defend the suspect, therefore, the lawyer acquires the formal procedural status of the suspect's defence counsel after (i.) entering into an agreement to defend a specific person, (ii.) issues a lawyer's order on the basis of this agreement, and (iii.) submits the lawyer's order to the state criminal procedure authority responsible for the specific criminal proceedings. This interpretation of the Code of Criminal Procedure and the Law on the Bar is, as it were, recognised by the Lithuanian courts.[47] However, as this interpretation of the law is inconvenient for the criminal prosecution authorities – because it removes the possibility of manipulation, exerting influence, and so on – the criminal prosecution authorities often hold a different view and, as they are the only ones with actual power, in practice they enforce their own view: namely, that a lawyer only acquires the procedural status of a specific suspect's defence counsel from the moment a pre-trial investigation officer or prosecutor draws up a 'Protocol on the Explanation of Rights Regarding a Defence Counsel', in which the suspect confirms with his signature his wish to be defended by a specific lawyer; until the pre-trial investigation officers or the prosecutor themselves draw up the 'Protocol on the Explanation of Rights Regarding a Defence Counsel', they 'do not know the 'true' will of the suspect' and do not allow the defence counsel access to the detained (arrested) suspect. Thus, according to the interpretation of the criminal prosecution

47 Merkevičius, *Gynybos baudžiamajame Procese Pagrindai. Primoji Dalis*, pp. 558–563.

authorities, a considerable amount of time passes before the suspect actually sees their defence counsel.[48]

Secondly, although the provision of Article 48(1)(3) of the Code of Criminal Procedure, stating that *the number and duration of meetings with a detained or arrested suspect <...> are not limited*, is worded in absolute and categorical terms; although the legislature does not provide for any reservations or exceptions to this provision of Article 48(1)(3) of the Code of Criminal Procedure, nevertheless, a defence lawyer may only meet with and communicate with a detained (arrested) defendant at the place where the defendant is being held in custody – a police station detention facility or a prison. The Law on the Enforcement of Arrest of the Republic of Lithuania[49] at first glance appears to echo the Code of Criminal Procedure: 'arrested persons have the right to meet, correspond with and telephone their defence counsel without hindrance'; *the number and duration of meetings and telephone calls, and the volume of correspondence, shall not be restricted* (Article 7(1) of the Law on the Enforcement of Detention); *during communication between detainees and their defence counsel, the confidentiality of such communication must be ensured* (Article 7(2) of the Law on Places of Detention), but it also points out one seemingly minor yet in fact crucial detail – under Article 7(1) of the Law on Places of Detention, a detainee has the right to *meet, correspond with and telephone their defence counsel without hindrance, in accordance with the procedure established by the Minister of Justice*. Paragraph 111 of the 'Internal Rules of Procedure for Places of Imprisonment', approved by Order of the Minister of Justice No.,[50] states that *the prison shall facilitate communication between detainees and convicted persons and their defence counsel (a lawyer or their assistant) on working days during the working hours of the prison administration*. Although this provision is not explicitly enshrined in the 'Internal Rules of Procedure for Territorial Police Detention Centres', approved by Order No.[51] of the Commissioner General of the Lithuanian

48 Merkevičius, *Gynybos baudžiamajame Procese Pagrindai. Primoji Dalis*, pp. 563–564.

49 Parliament of the Republic of Lithuania, Law on Pre-trial Detention of the Republic of Lithuania, No. I-1175, January 18, 1996, Valstybės žinios, No. 12-313, 9 February 1996 (later renamed the 'Law on the Enforcement of Arrest'). Hereinafter referred to as the Law on the Enforcement of Arrest or LEA.

50 Minister of Justice of the Republic of Lithuania, Order on the Implementation of the Code of the Enforcement of Sentences of the Republic of Lithuania, the Law on Probation of the Republic of Lithuania and the Law on the Enforcement of Detention of the Republic of Lithuania, No. 1R-444, December 30, 2022, TAR, No. 27599, December 30, 2022.

51 Lithuanian Police Commissioner General, Order on the Approval of the Internal Rules of Procedure of the Detention Facilities of Territorial Police Agencies, No. 5-V-1215, December 16, 2022, TAR, No. 25715, December 16, 2022.

Police, it is nevertheless in force *de facto* (presumably, as if it were 'natural and self-evident'). Thus, we are once again faced with a paradoxical situation where the Code of Criminal Procedure is 'superseded' by subordinate legislation of relatively low legal force: ignoring what is explicitly stated in Article 48(1)(3) of the Code of Criminal Procedure, a detainee held in a local police station detention facility, and an arrested person held in a local police station detention facility or a prison, the defence counsel has no opportunity either to meet 'whenever he wishes' (i.e. without limiting the 'number of meetings') or to communicate 'for as long as he wishes' (i.e. without limiting the 'duration of meetings').[52]

Thirdly, a defence lawyer may not meet with a detained (arrested) suspect anywhere else (in any other location) other than in the detention facilities of the local police station or in special rooms within a prison (the defence lawyer has no choice as to the 'meeting place'). Although, as mentioned, the provisions of the Code of Criminal Procedure stipulate absolute confidentiality regarding meetings and communication between the defence lawyer and the detained (arrested) suspect, in some of these special institutions (and perhaps in all of them, as this information is concealed), meetings and communication between the defence counsel and the detained (arrested) suspect are monitored and recorded using video and audio recording equipment. Attempts are made to 'sophistically justify' this practice by claiming that such 'security measures' are taken to ensure the safety of lawyers visiting these special institutions and communicating with their clients. Specifically, point 10.2 of the 'Rules on the Processing of Video Data Recorded by Video Surveillance Equipment in Police Institutions', approved by Order No.[53] of the Commissioner General of the Lithuanian Police (with reference to point 2.2), states that events, the environment, individuals, vehicles, buildings or other physical objects in police-owned buildings (premises, such as interview rooms), on their premises, public places are monitored and recorded by fixed video surveillance equipment installed in these buildings, their premises and public places. According to point 16 of these rules, <...> *in interview rooms,* <...> *video surveillance is carried out by recording both video and audio*. The rules make absolutely no exception for a defence lawyer's meetings and communication with a detained (arrested) person or a client otherwise present at a police station. Thus (the Commissioner General of the

52 Merkevičius, *Gynybos baudžiamajame Procese Pagrindai. Primoji Dalis*, pp. 622–625.

53 Lithuanian Police Commissioner General, Order on the amendment of Order No. 5-V-963 of the Commissioner General of the Lithuanian Police of 28 October 2015 on the Approval of the Rules for the Processing of Data Recorded by Video Surveillance in Police Institutions, No. 5-V-312, March 26, 2024. Not published in the Register of Legal Acts.

Lithuanian Police does not even conceal this in discussions with the Lithuanian Bar Association), stationary video surveillance equipment in police stations records the 'image and sound' of all meetings and conversations between defence lawyers and all clients. It is interesting (or rather strange) to note that point 4.2 of these Rules states that the 'legal act governing the processing of video data' is, allegedly, the Code of Criminal Procedure. This is a rather brazen interpretation: the Code of Criminal Procedure states the exact opposite of what the Rules are attempting to suggest. It is also worth noting that the Order of the Commissioner General of the Lithuanian Police,[54] which approves the 'Rules on the Processing of Video Data Recorded by Video Surveillance Means in Police Institutions', is not even registered in the Lithuanian Register of Legal Acts, thus likely with the deliberate aim of avoiding (and *de facto* avoiding) scrutiny of this legal act's compliance with higher-ranking legislation, *inter alia*, Article 31(6) of the Constitution and numerous provisions of the Code of Criminal Procedure and the Law on the Bar.[55]

Fourthly, the Code of Criminal Procedure and other laws of the Republic of Lithuania, *inter alia*, the Law on Criminal Intelligence of the Republic of Lithuania,[56] which is particularly characteristic of Lithuanian criminal justice, provide for the possibility of applying covert investigative measures (e.g. actions without revealing one's identity (Article 158 of the Code of Criminal Procedure) or covert surveillance (Article 160 of the Code of Criminal Procedure), including, inter alia, within a detention facility, do not preclude meetings and communication between the defence counsel and the detained (arrested) suspect. The Criminal Intelligence Act does not, in general, provide for any formal prohibitions on the application of certain criminal intelligence investigation actions or measures, such as the use of technical means in accordance with general or special procedures (Articles 2(21) and 2(22) of the Criminal Intelligence Act) against a detained or arrested suspect, their defence counsel, or their communication with one another at the place of detention or arrest.

In summary, despite the provisions of the Code of Criminal Procedure, in which the right of the defence counsel and the suspect (including a detained or arrested suspect) to meet without outsiders and to communicate unhindered

54 Order No. 5-V-312.

55 Supreme Administrative Court of Lithuania, rulling in administrative case no. eI-14-789/2026, April 8, 2026.

56 Parliament of the Republic of Lithuania, Law on Criminal Intelligence of the Republic of Lithuania, No. XI-2234, October 2, 2012, Valstybės žinios, No. 122-6093, October 20, 2012. Hereinafter referred to as the Criminal Intelligence Act or CIA.

is formulated in particularly ambitious terms: this right is publicly proclaimed, formulated in absolute terms and makes no provision for any exceptions or reservations, etc., nevertheless *the reality is considerably bleaker than the text of the criminal procedure law*: the fragmentary nature of the legal regulation enshrined in the Code of Criminal Procedure and the abstract nature of legal concepts, the incompatibility of legal regulation established by legislation of lower legal force with the Constitution, the Criminal Procedure Code and the Law on the Bar, or even the deliberate disregard of the fact that the relationship between the defence counsel and the defendant implies the need for special legal regulation, extremely weak (even nominal) judicial oversight, and an inability, or even unwillingness, to curb the arbitrariness and abuse of power by criminal prosecution authorities in interpreting and applying the Code of Criminal Procedure and the Criminal Intelligence Act, etc., turns the right of the defence counsel and the suspect to meet without outsiders and to communicate freely into *a privilege odiosum*.

Article 48(1)(2) of the Code of Criminal Procedure, whilst establishing the defence counsel's 'right to be present during the questioning of the suspect', also emphasises the defence counsel's right to meet with the suspect in private 'prior to questioning' and 'prior to the court hearing',[57] whilst Article 50(1) and Article 140(9) of the Code of Criminal Procedure state that 'a detained suspect shall be guaranteed the opportunity to meet with a defence counsel in private prior to the [first] interrogation' (these provisions, as mentioned, for some reason no longer specify the defence counsel's right to 'communicate without hindrance' during such a meeting). When the suspect is at liberty, the opportunity for the suspect and the defence counsel to meet without third parties and to communicate without hindrance 'before the first interrogation', 'before any questioning' and 'before every court hearing' is important, yet at the same time a self-evident and, relatively speaking, easily exercised right of the defence – its exercise depends on the will of the defence counsel and the defendant. Unlike the right of a suspect who is at liberty or in custody (under arrest) to meet with a defence counsel without third parties [and to communicate without hindrance] even 'before the first interrogation', which, pursuant to Article 140(8) of the Code of Criminal Procedure, must take place no later than 24 hours after the detained suspect has been brought to the pre-trial investigation authority, the public prosecutor's office or the place of temporary detention, for many criminal justice officials and even judges, the right to defence is not 'self-evident

57 Merkevičius, *Gynybos baudžiamajame Procese Pagrindai. Primoji Dalis*, pp. 634–639.

and worthy of respect': essentially because the first interrogation of the suspect and the statements made by the suspect during it are of immense significance for the further course and outcome of the criminal proceedings, and the early involvement of a defence lawyer in the criminal proceedings enhances the detained suspect's understanding of the process, provides the suspect with peace of mind, and strengthens their psychological state and emotional disposition, thus significantly reducing the chances of the criminal justice authorities 'extracting a confession from an inexperienced detained suspect as early as the first interrogation'. An active and principled defence lawyer reduces the scope for arbitrariness and abuse by the criminal prosecution authorities prior to the first interrogation of the detained suspect. The right of a detained suspect to meet with a defence lawyer in private prior to the first interrogation [and to communicate unhindered during this meeting], as enshrined in Article 50(1) and Article 140(9) of the Code of Criminal Procedure in a *positive* sense, prohibits criminal prosecution authorities from 'concealing' a detained suspect from their defence counsel, implies an obligation to agree in advance with the defence counsel on the time and place when and where the defence counsel could arrive and communicate with the detained suspect without hindrance, to provide adequate premises or a location that ensures confidentiality, where the defence counsel and the detained suspect can communicate without hindrance, not to rush or force the defence counsel to end the conversation, etc.

Unfortunately, these rights of the defence lawyer (and indeed of the suspect) *sound impressive only as long as they are set out on paper – in the Code of Criminal Procedure*; in the 'real-world' practice of criminal prosecution, the defence lawyer often wastes 'hours on end' trying to find out in which detention or pre-trial investigation facility his client is 'hidden and held', physical access to a client held in a detention facility is bureaucratised and *de facto* depends on the will of the criminal prosecution authorities (the prosecutor's permission),[58] and, as mentioned, meetings and conversations between the defence counsel and the defendant in detention facilities 'turn into films' – the criminal prosecution authorities record them on 'video and audio recordings'.

The right of the defence counsel and the suspect to meet without outsiders and to communicate freely, and the confidentiality of communication between the defence counsel and the defendant is ensured by so-called defence counsel or defence immunities (although, strictly speaking, it is doubtful whether they can all be accurately (justifiably) termed 'immunities', and in Article 46 of

58 Merkevičius, *Gynybos baudžiamajame Procese Pagrindai. Primoji Dalis*, pp. 632–634.

the Law on the Bar they are referred to as 'guarantees of a lawyer's practice'). In Lithuania, defence counsel (defence) immunities are largely enshrined in the Law on the Bar and other legislation governing the professional activities and ethics of lawyers (although in fact they should be specified in the Code of Criminal Procedure, as well as in the Law on Criminal Intelligence). The following defences (defence) immunities deserve separate mention, as they ensure the reality and effectiveness of the right of the defence counsel and the suspect under defence to meet without outsiders and to communicate unhindered:[59]

(i.) the defence counsel's (lawyer's) 'immunity from giving evidence' – the defence counsel (lawyer): (a.) may not, of their own accord (on their own initiative or with their consent), give evidence or provide any explanations (Article 46(1) of the Law on the Bar), nor (b.) may they be summoned for questioning or any other procedural (investigative) action, nor may they be questioned, asked, compelled, obliged, encouraged, etc. to provide information (Article 80(3) of the Code of Criminal Procedure, Article 46(1) of the Law on Advocacy),

(ii.) the defence counsel's *immunity from the monitoring and recording of their correspondence, telephone conversations, electronic and other communications, as well as any other form of communication* – it is prohibited to: (a.) monitoring meetings, correspondence, telephone conversations and other forms of communication between the suspect and their defence counsel (Articles 44(8) and 154(7) of the Code of Criminal Procedure, Article 46(3) of the Law on Advocacy) and (b.) to access, either openly or covertly, information constituting a lawyer's professional secret (Article 46(5) of the Law on Advocacy). It is true that a defence counsel's (lawyer's) *immunity from the monitoring and recording of their correspondence, telephone conversations, electronic and other communications, as well as any other form of communication* is not absolute. On the one hand, the prohibition on inspecting postal items, listening in on telephone conversations, monitoring information transmitted via other telecommunications networks and other forms of communication does not apply where the lawyer himself is suspected or accused of having committed a criminal offence; however, *this authorisation applies only to documents relating to the charges or allegations brought* (Article 46(3) of the Law on Criminal Intelligence). On the other hand, as mentioned, the Criminal Intelligence Act pays no attention either to 'lawyers' or to the 'defence counsel' of suspects (accused persons) 'defence counsel' in criminal proceedings, nor to the immunities enjoyed by

59 Merkevičius, *Gynybos baudžiamajame Procese Pagrindai. Primoji Dalis*, pp. 639–676.

defence counsel (lawyers), and, by providing for the possibility of using all methods and means of gathering criminal intelligence, for example, the possibility of installing and using technical devices in accordance with general or special procedures (Articles 2(20) to (22), 6(3)(2) and 10 of the Criminal Intelligence Act), to secretly monitor correspondence and other communications (Article 10 of the Criminal Intelligence Act), to enter dwellings, offices and other premises, restricted areas, and vehicles; to inspect them; to seize documents or other items for examination, to inspect and/or mark them without disclosing their seizure (Article 6(3)(3) and Article 11 of the Law on Criminal Procedure), and so on, makes no exceptions or exemptions for 'solicitors', 'defence lawyers', 'solicitors' workplaces', 'technical equipment used by solicitors' (e.g. computers, mobile phones) and so on. The Criminal Intelligence Act does not even link the possibility of applying criminal intelligence information gathering methods and means to lawyers with Article 46(3) of the Bar Act.

(iii.) the defence counsel's (lawyer's) *immunity from searches, seizures, and the inspection, seizure and recording of documents and other data in their possession* – it is prohibited to: (a.) *to access, either publicly or secretly, information constituting a lawyer's professional secret* – which is deemed to include *the fact of consulting a lawyer, the terms of the contract with the client, information provided by the client and data submitted, the nature of the consultation and data collected by the lawyer on the client's instructions, as well as the content of other communications between the lawyer and the client (meetings, correspondence, telephone conversations or other forms of communication* – and 'to use it as evidence' (Article 46(5) of the Law on the Bar). Since this prohibition primarily protects not the lawyer (defence counsel) but their client (suspect, accused), this prohibition under the Law on the Bar is absolute, categorical and makes no provision for any reservations or exceptions; (b.) a search or seizure at the workplace, residential premises or vehicle of a lawyer registered on the list of practising lawyers in Lithuania, a personal search, or an inspection of documents or postal items, inspection or seizure may only be carried out in the presence of a member of the Bar Council of the Lithuanian Bar Association or a lawyer authorised by it, who must ensure that no documents unrelated to the allegations or charges brought against the lawyer are seized (Article 46(4) of the Law on the Bar).

(iv.) a defence counsel's (lawyer's) 'immunity from supervision of their professional activities' – it is prohibited to 'supervise a lawyer's actions', i.e. any professional activity of a lawyer, such as following a lawyer, acting in relation to them without revealing one's identity, installing technical devices at the lawyer's

workplace, residence, in a vehicle, etc., which allow for the monitoring, control and recording of the lawyer's actions, meetings, etc. (Article 46(3) of the Law on the Bar), except in cases where the lawyer himself is suspected or accused of having committed a criminal offence.

(v.) a prohibition on a lawyer, registered in the list of practising lawyers of Lithuania and performing professional duties, from participating in intelligence and/or criminal intelligence activities, and from working or holding other paid positions, except for work at the Lithuanian Bar Association, voluntary non-regular military service and scientific, creative or pedagogical activities, as well as the activities specified in Article 4(4) of the Law on the Bar (Article 43(1) of the Law on the Bar).

One of the most procedurally significant legal instruments ensuring the right of a defence counsel and a suspect to meet without third parties and to communicate freely, the confidentiality of communication between a defence counsel and their client, and, more generally, the legal instruments ensuring the professional (client) confidentiality of the defence counsel (lawyer) is the prohibition, *expressly* laid down in Article 45(2) of the Law on the Bar, on using the details of a meeting or communication between a lawyer and their client as evidence.

4. Conclusions

To summarise the academic and practical analysis presented above, the following key conclusions may be drawn:

1. In criminal proceedings, a suspect usually has no real opportunity to defend himself effectively against the charges and the coercive measures applied to him without the assistance of a lawyer (defence counsel); therefore, the effectiveness of the 'suspect's right to defence' and of defence as a procedural function is determined by the procedural rights and opportunities granted to the defence counsel as a separate, independent subject of criminal proceedings.
2. A suspect in criminal proceedings finds themselves in a wide variety of 'critical situations' in which they require the assistance and advice of a defence lawyer. The most important of these are: (i.) the moment when a person learns that they have been implicated in criminal proceedings as a suspect: being summoned for questioning as a suspect

or being arrested, (ii.) the moment when the suspect must decide on their defence position and the strategy for implementing it, (iii.) the suspect's questioning (particularly the first one) and (iv.) situations where the criminal prosecution authorities or courts begin to decide on matters directly related to the suspect's liberty, rights or fate. One of the most important rights of the defence counsel (and of the suspect themselves), which helps the suspect to 'navigate successfully' these 'critical situations', is the right of the defence counsel (and of the suspect) to meet without outsiders and to communicate unhindered.

3. The Code of Criminal Procedure clearly (not through 'general' provisions and leaving no room for ambiguity or doubt) does not oblige the pre-trial investigation officer and the prosecutor to 'explain' the suspect's rights to him at that time and in such a way so that the suspect understands them and can exercise them 'effectively'.
4. The Code of Criminal Procedure does not oblige a pre-trial investigation officer or a prosecutor, upon arresting a suspect (at the time of arrest or immediately thereafter), to explain to the detained suspect his right, from the moment of actual detention, to meet with a defence lawyer in private and to communicate without hindrance. In this respect, the Code of Criminal Procedure fails to properly implement Directive 2013/48/EU on the right of access to a lawyer (and certain other relevant EU directives in this regard) and inadequately ensures the operation of Article 31(6) of the Constitution.
5. In the 'Annex to the Protocol on the Explanation of Rights to the Suspect', which is served on the suspect prior to the first interview, the suspect's *ex lege* 'right to meet with a defence lawyer in private and without interference from third parties from the moment of actual arrest or the first interview' is 'transformed' to 'the right to meet with a defence lawyer without the presence of third parties'.
6. The imprecision, incompleteness and ambiguity of the legal provisions set out in the Code of Criminal Procedure, and in particular the abuse of power by the criminal prosecution authorities (the absence of real and effective judicial oversight that would 'restore legality',) give rise to numerous violations of the right of the defence counsel (and, by extension, the suspect) to meet in private and communicate without hindrance: for example, (a.) the failure of the Code of Criminal Procedure to specify a clear point in time at which a lawyer is deemed to have 'acquired the procedural status of the suspect's defence counsel', and thus having the right to meet

with the suspect without third parties and to communicate unhindered, gives criminal prosecution authorities the opportunity to artificially delay the time of the meeting between the defence counsel and the detained (or arrested) suspect, (b.) although it is common knowledge that meetings and conversations between a defence counsel and a detained (or even a free) suspect taking place at police stations are recorded by video and audio recording equipment and are even used for evidential purposes, such a practice is tolerated, (c.) The Criminal Intelligence Act pays no heed to the specific safeguards afforded by the Constitution and the Bar Act to confidential communication between a defence lawyer and their client, etc.

References

International legal instruments

The Council of Europe. Council of Europe Convention for the Protection of the Profession of Lawyer. Accessed?. https://www.ccbe.eu/fileadmin/speciality_distribution/public/images/pages/projects/ENFR_2025_Convention-on-the-Protection-of-the-Profession-of-Lawyer.pdf.

The Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders. Basic Principles on the Role of Lawyers. Septemer 7, 1990. https://www.ohchr.org/en/instruments-mechanisms/instruments/basic-principles-role-lawyers.

European Court of Human Right, Council of Europe. European Convention on Human Rights. October 2, 2013. https://www.echr.coe.int/documents/d/echr/convention_ENG.

United Nations General Assembly. Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment. Resolution no. 43/173. December 9, 1988. https://docs.un.org/en/a/res/43/173.

United Nations General Assembly. International Covenant on Civil and Political Rights. Resolution no. 2200A (XXI). December 16, 1996. https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights.

United Nations General Assembly. United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems. Resolution no. 67/187. December 20, 2012. https://docs.un.org/en/a/res/67/187.

United Nations Human Rights Committee. International Covenant on Civil and Political Rights. General Comment No. 32. August 23, 2007. https://docstore.ohchr.org/Self-Services/FilesHandler.ashx?enc=O5ff1FQdLycnTGLImCUQrabcwYcitpvm%2B3%2B-9dElTKTv7ejJOg6wCdgAExTaKIqExUd%2B7u3O2DMYtbqyxPiPdYg%3D%3D.

European Union legislation

The European Parliament and the Council of the European Union. Directive 2010/64/EU the European Parliament and of the Council of 20 October 2010 on the Right to Interpretation and Translation in Criminal Proceedings. Official Journal of the European Union. L 280/1. October 26, 2010. https://eur-lex.europa.eu/legal-content/LT/TXT/?uri=CELEX%3A32010L0064&qid=1771960296259.

The European Parliament and the Council of the European Union. Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the Right to Information in Criminal Proceedings. Official Journal of the European Union. L 142/1. June 1, 2012. https://eur-lex.europa.eu/legal-content/LT/TXT/?uri=CELEX%3A32012L0013&qid=1771960296259.

The European Parliament and the Council of the European Union. Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the Right of Access to a Lawyer in Criminal Proceedings and in European Arrest Warrant Proceedings, and on the Right to Have a Third Party Informed upon Deprivation of Liberty and to Communicate with Third Persons and with Consular Authorities while Deprived of Liberty. Official Journal of the European Union. L 29/1. November 6, 2013. https://eur-lex.europa.eu/legal-content/LT/TXT/?uri=CELEX%3A32013L0048&qid=1771960296259.

The European Parliament and the Council of the European Union. Directive (EU) 2016/800 of the European Parliament and of the Council of 11 May 2016 on Procedural Safeguards for Children Who Are Suspects or Accused Persons in Criminal Proceedings. Official Journal of the European Union. L 132/1. May 21, 2016. https://eur-lex.europa.eu/legal-content/LT/TXT/?uri=CELEX%3A32016L0800&qid=1771960296259.

The European Parliament and the Council of the European Union. Directive (EU) 2016/1919 of the European Parliament and of the Council of 26 October 2016 on Legal Aid for Suspects and Accused Persons in Criminal Proceedings and for Requested Persons in European Arrest Warrant Proceedings. Official Journal of the European Union. L 297/1. November 4, 2016. https://eur-lex.europa.eu/legal-content/LT/TXT/?uri=CELEX%3A32016L1919&qid=1771960296259.

National legislation

The Constitution of the Republic of Lithuania. Valstybės žinios. No. 33-1014. November 30, 1992.

Lithuanian Police Commissioner General. Order on the Approval of the Internal Rules of Procedure of the Detention Facilities of Territorial Police Agencies. No. %-V-1215. December 16, 2022. TAR. No. 25715. December 16, 2022.

Lithuanian Police Commissioner General. Order on the amendment of Order No. 5-V-963 of the Commissioner General of the Lithuanian Police of 28 October 2015 on the Approval of the Rules for the Processing of Data Recorded by Video Surveillance in Police Institutions. No. 5-V-312. March 26, 2024. Not published in the Register of Legal Acts.

Minister of Justice of the Republic of Lithuania. Order on the Approval of the Statute of the Lithuanian Bar. No. 288. October 1, 1999. Valstybės žinios. No. 95-2753. November 10, 1999.

Minister of Justice of the Republic of Lithuania. Order on the Publication of the Code of Ethics for Lithuanian Lawyers' Code of Ethics. No. 1R-133. April 22, 2016. TAR. No. 10280. April 22, 2016.

Minister of Justice of the Republic of Lithuania. Order on the Implementation of the Code of the Enforcement of Sentences of the Republic of Lithuania, the Law on Probation of the Republic of Lithuania and the Law on the Enforcement of Detention of the Republic of Lithuania. No. 1R-444. December 30, 2022. TAR. No. 27599. December 30, 2022.

The Parliament of the Republic of Lithuania. Law on Pre-trial Detention of the Republic of Lithuania. No. I-1175. January 18, 1996. Valstybės žinios. No. 12-313. 9 February 1996. (later renamed the 'Law on the Enforcement of Arrest').

The Parliament of the Republic of Lithuania. Law on the Approval and Entry into Force of the Criminal Code of the Republic of Lithuania. Criminal Code. No. VIII-1968. September 26, 2000. Valstybės žinios. No. 89-2741. October 25, 2000.

The Parliament of the Republic of Lithuania. Law on the Approval, Entry into Force and Implementation of the Code of Criminal Procedure of the Republic of Lithuania. Code of Criminal Procedure. No. IX-785. March 14, 2002. Valstybės žinios. No. 37-1341. April 9, 2002.

The Parliament of the Republic of Lithuania. Law on the Bar of the Republic of Lithuania. No. VIII-811. June 25, 1998. Valstybės žinios. April 6, 2004. No. 50-1632.

The Parliament of the Republic of Lithuania. Law on Criminal Intelligence of the Republic of Lithuania. No. XI-2234. October 2, 2012. Valstybės žinios. No. 122-6093. October 20, 2012.

Prosecutor General of the Republic of Lithuania. Order on the Approval of Forms of Criminal Procedure Documents. No. I-288. December 29, 2014. TAR. No. 20097. December 30, 2014.

Prosecutor General of the Republic of Lithuania. Order on the Approval of the Form of a Criminal Procedure Document. No. I-219. July 19, 2019. TAR. No. 11987. July 22, 2019.

Prosecutor General of the Republic of Lithuania. Order on the Order of the Prosecutor General of the Republic of Lithuania No. 29 December 2014 no. I-288 on the Approval of Forms of Criminal Procedure Documents. No. I-243. August 27, 2019. TAR. No. 13523. August 27, 2019.

Prosecutor General of the Republic of Lithuania. Order on the Order of the Prosecutor General of the Republic of Lithuania of 29 December 2014 no. I-288 on the Approval of Forms of Criminal Procedure Documents. No. I-107. April 28, 2020. TAR. No. 08898. April 28, 2020.

Prosecutor General of the Republic of Lithuania. Order on the Order of the Prosecutor General of the Republic of Lithuania of 29 December 2014 no. I-288 on the Approval of Forms of Criminal Procedure Documents. No. I-79. February 24, 2022. TAR. No. 03502. February 24, 2022.

Prosecutor General of the Republic of Lithuania. Order on the Order of the Prosecutor General of the Republic of Lithuania of 29 December 2014 no. I-288 on the Approval of the Forms of Criminal Procedure Documents. No. I-272. September 14, 2022. TAR. No. 18836. September 14, 2022.

Prosecutor General of the Republic of Lithuania. Order on the Order of the Prosecutor General of the Republic of Lithuania of 19 July 2019 no. I-219 on the Approval of the Form of a Criminal Procedure Document. No. I-71. April 3, 2024. TAR. No. 06215. April 3, 2024.

Prosecutor General of the Republic of Lithuania. Order on the Order of the Prosecutor General of the Republic of Lithuania of 29 December 2014 no. I-288 on the Approval of Forms of Criminal Procedure Documents. No. I-80. April 17, 2024. TAR. No. 07073. April 17, 2024.

Prosecutor General of the Republic of Lithuania. Explanatory Note on the Implementation of Article 51(1)(10) of the Code of Criminal Procedure. Not published in the Register of Legal Acts.

Specialist literature

Barton, Stephan. Einführung in die Strafverteidigung. 2nd edition. C. H. Beck, 2013.

Brenner, Harald. Die strafprozessuale Überwachung des Fernmeldeverkehrs mit Verteidigern: Zugleich ein Beitrag zu den Beweisverboten, auch im Zusammenhang mit neuen Formen der Telekommunikation. Mohr Siebeck, 1994.

European Court of Human Rights. Guide on Article 6 of the European Convention on Human Rights: Right to a fair trial (criminal limb). Updated on 31 August 2025. https://ks.echr.coe.int/documents/d/echr-ks/guide_art_6_criminal_eng.

Merkevičius, Remigijus. Gynybos baudžiamajame Procese Pagrindai: Mokslo Monografija. Primoji Dalis. Ksiegarnia Akademicka, 2024. https://doi.org/10.12797/9788383681115.

Merkevičius, Remigijus. Gynybos baudžiamajame Procese Pagrindai: Mokslo Monografija. Antroji Dalis. Ksiegarnia Akademicka, 2024. https://doi.org/10.12797/9788383681160.

Momsen, Carsten. "U-Haft schafft Rechtskraft. Rechtswidrige „Post-mortem"-Absprache, Befangenheit und Fehlurteil." Strafverteidiger Forum, no. 3 (2019): pp. 89–95.

Ostendorf, Heribert. "U-Haft Vollzug – Stiefkind der Strafrechtspflege." Neue Kriminalpolitik 21, no. 4 (2009): pp. 125–131.

Renzikowski, Joachim. "Das Recht auf den Beistand eines Verteidigers im Lichte von Art. 6 Abs. 3 lit. c EMRK und des 6th Amendments zur US-Verfassung." In Manfred Heinrich, ChristianJäger, Bernd Schünemann et al., eds. Strafrecht als Scientia Universalis. Festschrift für Claus Roxin zum 80. Geburtstag am 15. Mai 2011. De Gruyter, 2011. https://doi.org/10.1515/9783110255287.

Vetter, Mandy. Verteidigerkonsultation im Ermittlungsverfahren Eine rechtsvergleichende Untersuchung zum deutschen und englischen Strafverfahrensrecht im Lichte der Europäischen Menschenrechtskonvention. Series S: Strafrechtliche Forschungsberichte . Vol. 160. Duncker & Humblot, 2018.

Case law

Supreme Administrative Court of Lithuania. Rulling in administrative case no. eI-14-789/2026. April 8, 2026. https://www.lvat.lt/teismu-praktika/normines-bylos/atsisakyti-priimti-prasymai/697/act154.

Preparatory work

Government of the Republic of Lithuania. Resolution on the Law Amending Articles 10, 21, 44, 48, 50, 52, 69, 69(1), 71(1), 72, 128, 140, 168 and 233 of the Code of Criminal Procedure of the Republic of Lithuania and the Annex thereto, the Law amending Articles 45 and 46 of the Law on the Bar of the Republic of Lithuania No. IX-2066 and the Annex thereto, and the Law amending Articles 14, 23 and 31 of the Law on the Enforcement of Detention of the Republic of Lithuania No. I-1175. No. 16-9737. September 9, 2016. https://e-seimas.lrs.lt/portal/legalAct/lt/TAP/24a23971766311e6a0f68fd135e6f40c?jfwid=-10siklxwg3.

Ministry of Justice of the Republic of Lithuania. Explanatory memorandum to the Draft Law on the Amendment of Articles 21 and 22 of the Code of Criminal Procedure of the Republic of Lithuania and the Addition of a Supplement to the Code. XIIP-1390. December 19, 2013. https://e-seimas.lrs.lt/portal/legalAct/lt/TAK/TAIS.462700?jfwid=-10siklxxru.

Ministry of Justice of the Republic of Lithuania. Explanatory memorandum on the Amendment of Articles 21, 22, 53, 54, 105 and 188 of the Code of Criminal Procedure of the Republic of Lithuania, the addition of Articles 27(2), 189(1) and the Annex thereto, and the draft laws amending Articles 10 and 45 of the Law of the Republic of Lithuania on the Enforcement of Detention No. I-1175 and the Annex thereto. No. XIIIP-3469. May 17, 2019. https://e-seimas.lrs.lt/portal/legalAct/lt/TAK/56b9b740787111e99ceae2890faa4193?jfwid=-10siklxzeb.

Abstract

The Validity of the Right of a Defence Counsel (and the Suspect) to Meet Without Outsiders and to Communicate Without Interference in Lithuania, in Light of European Standards

Since around the end of 2009, the European Union has focused its attention on the rights and opportunities of suspects (defendants) in criminal proceedings. The right to actively defend oneself against charges is an 'innate human right' – a right that a person 'brings into the material world at birth', a right that no one has granted to a person, and therefore no one can take away (has no 'right' to do so). The right to defend oneself is an expression of one of the fundamental human needs – the need for justice. The suspect's right to actively defend oneself, in terms of its content, is a 'dual right' – it encompasses the suspect's (a.) 'right to defend

oneself (to defend oneself)' and (b.) 'the right to be defended by a professional lawyer' – and only this synergy (of the joint efforts of the suspect and their defence counsel) gives the suspect's 'right to defence' (the suspect's defence as a procedural function) its greatest effectiveness.

The aim of this article is to reveal the content and effectiveness of the right of the defence counsel (and, consequently, the suspect) to meet without outsiders and to communicate unimpeded within the Lithuanian criminal justice system, and to assess the compliance of prevailing practice in Lithuania with the standards set by international law and European Union law.

To achieve this objective, the following three key tasks are set: (i.) to identify 'critical situations' in which the suspect most needs the defence counsel's advice and assistance, (ii.) based on the Code of Criminal Procedure and other Lithuanian national laws, define the scope of the defence counsel's (and the suspect's) right to meet without third parties and to communicate unimpeded, as guaranteed in the Lithuanian criminal justice system, and (iii.) to assess the quality, effectiveness, and compliance with the standards set forth in international law and European Union law of the right of the defence counsel (and the suspect) to meet without outsiders and communicate freely, as guaranteed in Lithuania.

An analysis of legal acts and literature revealed that in criminal proceedings, a suspect typically has no real opportunity to effectively defend himself against the charges and the coercive measures applied to him on his own, without the assistance of a lawyer (defence counsel), therefore, the effectiveness of the 'suspect's right to defence' and of defence as a procedural function is determined by the procedural rights and opportunities granted to the defence counsel as a separate, independent subject of criminal proceedings.

A suspect in criminal proceedings finds themselves in a multitude of different 'critical situations' in which they require the assistance and advice of a defence attorney. The most important of these are: (i.) the moment when a person learns that they have been implicated in criminal proceedings as a suspect: being summoned for questioning as a suspect or being detained, (ii.) the moment when the suspect must decide on their defence strategy and how to implement it, (iii.) the suspect's interrogation (especially the first one), and (iv.) situations where law enforcement agencies or courts begin to address issues directly related to the suspect's liberty, rights, or fate. One of the most important rights of the defence counsel (and of the suspect himself), which helps the suspect 'navigate successfully' these 'critical situations', is the right of the defence counsel (and of the suspect) to meet without outsiders and to communicate freely.

The Code of Criminal Procedure does not explicitly require the pre-trial investigation officer or the prosecutor to 'explain' the suspect's rights to him in such a way and at such a time that the suspect understands them and can exercise them 'effectively'. The Code of Criminal Procedure does not require a pre-trial

investigation officer or prosecutor, upon detaining a suspect (at the time of detention or immediately thereafter), to explain to the detained suspect his right, from the moment of actual detention, to meet with a defence attorney without the presence of third parties and to communicate without hindrance. In this regard, the Code of Criminal Procedure fails to properly implement Directive 2013/48/EU on the right to a lawyer (and certain other relevant EU directives in this regard) and inadequately ensures the implementation of Article 31(6) of the Constitution. In the 'Appendix to the Protocol on the Explanation of Rights to the Suspect', which is provided to the suspect prior to the first interrogation, the suspect's *ex lege* 'right to meet with a defense attorney without the presence of third parties and to communicate with them without interference from the moment of actual detention or the first interrogation' is 'transformed' to 'the right to meet with a defence attorney without the presence of third parties'.

The inaccuracy, incompleteness, and ambiguity of the legal regulations set forth in the Code of Criminal Procedure, and especially the abuse of power by criminal prosecution authorities (the absence of real and effective judicial oversight that would 'restore legality') give rise to numerous violations of the defence counsel's (and, consequently, the suspect's) right to meet without outsiders and to communicate unimpeded.

Keywords: right to defence, defence counsel, suspect, confidential communication, criminal proceedings

Santrauka

Gynėjo (kartu ir įtariamojo) teisės susitikti be pašalinių ir nekliudomai bendrauti veiksmingumas Lietuvoje ir atitiktis ES standartams

Europos Sąjunga nuo maždaug 2009 metų pabaigos savo dėmesį fokusuoja į įtariamųjų (kaltinamųjų) teises ir galimybes baudžiamajame procese. Teisė aktyviai gintis (ginti save) nuo apkaltinimo yra „įgimta žmogaus teisė" – teisė, kurią žmogus į materialųjį pasaulį „atsineša gimdamas", kurios žmogui niekas nedavė, todėl ir atimti niekas negali (neturi „teisės"). Teisė gintis yra vieno fundamentaliųjų žmogaus poreikių – teisingumo poreikio – išraiška. Įtariamojo teisė aktyviai gintis pagal savo turinį yra „dvilypė teisė" – apima įtariamojo (a.) „teisę gintis pačiam (ginti save)" ir (b.) „teisę būti ginamam profesionalaus teisininko" – ir tik ši (įtariamojo ir jo gynėjo bendrų pastangų) sinergija suteikia įtariamojo „teisei į gynybą" (įtariamojo gynybai kaip procesinei funkcijai) didžiausio veiksmingumo krūvį.

Straipsnio tikslu siekiama atskleisti gynėjo (kartu ir įtariamojo) teisės susitikti be pašalinių ir nekliudomai bendrauti turinį ir veiksmingumą Lietuvos

kriminalinėje justicijoje, įvertinti Lietuvoje vyraujančios praktikos atitiktį tarptautinės teisės ir Europos Sąjungos teisės keliamiems standartams.

Siekiant užsibrėžto tikslo, išsikelti šie trys esminiai uždaviniai: (i.) išskirti „kritines situacijas“, kuriose įtariamajam yra labiausiai reikalingas gynėjo patarimas ir pagalba, (ii.) remiantis Baudžiamojo proceso kodeksu bei kitais Lietuvos nacionalinės teisės aktais apibrėžti gynėjo (kartu ir įtariamojo) teisės susitikti be pašalinių ir nekliudomai bendrauti turinį, kuris yra užtikrinamas Lietuvos kriminalinėje justicijoje, bei (iii.) įvertinti Lietuvoje garantuojamos gynėjo (kartu ir įtariamojo) teisės susitikti be pašalinių ir nekliudomai bendrauti kokybę, veiksmingumą ir atitiktį tarptautinėje teisėje ir Europos Sąjungos teisėje suformuluotiems standartams.

Atlikta teisinių aktų, literatūros analizė atskleidė, kad baudžiamajame procese įtariamasis įprastai neturi realios galimybės vienas pats, be advokato (gynėjo) pagalbos veiksmingai apsiginti nuo įtarimo ir jam taikomos prievartos, todėl „įtariamojo teisės į gynybą“ ir gynybos kaip procesinės funkcijos veiksmingumą lemia gynėjui kaip atskiram, savarankiškam baudžiamojo proceso subjektui suteiktos procesinės teisės ir galimybės. Įtariamasis baudžiamajame procese patenka į daugybę įvairių „kritinių situacijose“, kuriose jam yra būtina gynėjo pagalba ir patarimas. Svarbiausios jų yra: (i.) momentas, kai asmuo sužino, jog yra įtrauktas į baudžiamąjį procesą įtariamuoju: iškviečiamas į apklausą įtariamuoju ar yra sulaikomas, (ii.) momentas, kai įtariamasis turi apsispręsti dėl savo gynybos pozicijos ir jos įgyvendinimo strategijos, (iii.) įtariamojo apklausa (ypač pirmoji) ir (iv.) situacijos, kai baudžiamojo persekiojimo institucijos ar teismai imasi spręsti klausimus, tiesiogiai susijusius su įtariamojo laisve, teisėmis ar likimu. Viena svarbiausių gynėjo (kartu ir paties įtariamojo) teisių, kuri padeda įtariamajam „kokybiškai išgyventi“ šiose „kritinėse situacijose“, yra gynėjo (kartu ir įtariamojo) teisė susitikti be pašalinių ir nekliudomai bendrauti.

Baudžiamojo proceso kodeksas aiškiai neįpareigoja ikiteisminio tyrimo pareigūno ir prokuroro „išaiškinti“ įtariamajam jo turimas teises tada ir taip, kad įtariamasis jas suprastų ir galėtų jomis pasinaudoti „veiksmingai“. Baudžiamojo proceso kodeksas neįpareigoja ikiteisminio tyrimo pareigūno ar prokuroro, sulaikius įtariamąjį (sulaikymo metu ar iš karto po to), išaiškinti sulaikytam įtariamajam jo teisę nuo faktinio sulaikymo momento susitikti su gynėju be pašalinių ir nekliudomai bendrauti. Šiuo požiūriu Baudžiamojo proceso kodeksas netinkamai įgyvendina Direktyvą 2013/48/ES dėl teisės turėti advokatą (ir kai kurias kitas šiuo požiūriu aktualias ES direktyvas) bei neadekvačiai užtikrina Konstitucijos 31 straipsnio 6 dalį veikimą. Prieš pirmąją apklausą įtariamajam įteikiamame „Teisių įtariamajam išaiškinimo protokolo priede“ įtariamojo *ex lege* turima „teisė susitikti be pašalinių ir nekliudomai bendrauti su gynėju nuo faktinio sulaikymo arba pirmosios apklausos momento“ yra „paverčiama“ „teise matytis su gynėju be pašalinių asmenų“.

Baudžiamojo proceso kodekse nustatyto teisinio reglamentavimo netikslumas, neišsamumas ir neaiškumas ir ypač baudžiamojo persekiojimo institucijų piktnaudžiavimas turima galia (realios ir veiksmingos teisminės kontrolės, kuri „sugrąžintų teisėtumą“, nebuvimas) sukuria daugybę gynėjo (kartu ir įtariamojo) teisės susitikti be pašalinių ir nekliudomai bendrauti pažeidimų.

Pagrindiniai žodžiai: teisė į gynybą, gynėjas, įtariamasis, konfidencialus bendravimas, baudžiamasis procesas

Editors/Authors

1. Editor and Author – **Gabrielė Juodkaitė-Granskienė** is a doctor of law and professor at the Law Faculty of Vilnius University, Chairman of the Criminal Cases Division of the Supreme Court of Lithuania, researcher in the fields of forensic expertise, scientific evidence, evidence and proving procedure, and European Union standards in the field of the use of special knowledge, criminal procedure. E-mail: gabriele.juodkaite-granskiene@tf.vu.lt.

2. Editor and Author – **Andrej Gorbatkov** is a doctor of law and associate professor at the Law Faculty of Vilnius University, a researcher in the fields of Criminalistics, crime investigation methodology, criminal procedure law, forensic examination, and scientific evidence. E-mail: andrejus.gorbatkovas@tf.vu.lt.

3. **Donatas Murauskas** is a doctor of law and associate professor at the Law Faculty of Vilnius University, LL.M., attorney at Ellex, researcher in the fields of human rights, legal reasoning, law and technology, supranational and national courts, constitutional law. E-mail: donatas.murauskas@tf.vu.lt.

4. **Charles Szypszak** is Albert Coates Distinguished Professor of Public Law and Government at the University of North Carolina at Chapel Hill, United States, where he teaches undergraduate and graduate law courses and advises and trains public officials. E-mail: szypszak@sog.unc.edu.

5. **Ramūnas Birštonas** is a doctor of law and professor at the Law Faculty of Vilnius University, Chairman of the Lithuanian Copyright and Related Rights Commission, researcher in the fields of Intellectual Property Law, Property Law, and Protection of personal non-property rights. E-mail: ramunas.birstonas@tf.vu.lt.

6. **Ramunė Žiedė** is a doctor of law and lecturer at the Law Faculty of Vilnius University. Main areas of scientific interest and research – criminal law, special part of criminal law, crimes against intellectual property. E-mail: ramune.ziede@tf.vu.lt.

7. **Andželika Vosyliūtė** is a doctor of law and associate professor at the Law Faculty of Vilnius University, attorney Andželika Vosyliūtė's office, researcher in the fields of criminal law, property crimes, sentencing law, parole from a prison. E-mail: andzelika.vos@gmail.com.

8. **Laura Šivickaitė** is a doctor of law and assistant professor at the Law Faculty of Vilnius University, researcher in the fields of criminal proceedings, forensic examination, deonthological examination, criminal liability of healthcare professionals. E-mail: laura.sivickaite@tf.vu.lt.

9. **Justas Namavičius** is a doctor of law and lecturer at the Law Faculty of Vilnius University, Judge of the Criminal Cases Division of the Lithuanian Court of Appeal, researcher in the fields of General Part of Criminal Law, European Criminal Law, International Legal Assistance in Criminal Matters. E-mail: justas.namavicius@tf.vu.lt.

10. **Neringa Gaubienė** is a doctor of law and assistant professor at the Law Faculty of Vilnius University, researcher in the fields of Civil Procedure, Roman Law, Impact of Technology on Law, Business Law. E-mail: neringa.gaubiene@tf.vu.lt.

11. **Kristina Pranevičienė** is a doctor of law and assistant professor at the Law Faculty of Vilnius University, researcher in the fields of International and European Union civil procedure, civil procedure law, civil law, digitisation process in law, and digitisation in civil procedure. E-mail: kristina.praneviciene@gmail.com.

12. **Justyna Levon** is a doctor of law and associate professor at the Law Faculty of Vilnius University, Head of the Training Center of the Faculty of Law of Vilnius University, researcher in the field of Criminal Justice. E-mail: justyna.levon@tf.vu.lt.

13. **Dovilė Valančienė** is a doctor of law and assistant professor at the Law Faculty of Vilnius University. Areas of professional interest: Theory of law,

history of law, philosophy of law, law and neuroscience, changes of science, interdisciplinarity, neuroscience and decision-making, neuroethics, health law. E-mail: dovile.valanciene@tf.vu.lt.

14. **Ligita Gasparėnienė** is a professor at the Department of Criminal Justice of the Faculty of Law at Vilnius University. Her research focuses on the shadow economy, corruption, money laundering, sustainability, and renewable energy. She is the author of numerous international scientific publications, monographs, and research projects, and is an active expert in her field. E-mail: ligita.gaspareniene@tf.vu.lt.

15. **Rita Remeikienė** is a Senior Researcher at the Department of Criminal Justice of the Faculty of Law at Vilnius University. Her research focuses on the shadow economy, corruption, money laundering, the Green Deal, self-employment, and labour market issues. She is the author and co-author of numerous international scientific publications, monographs, and research projects, and her work contributes to evidence-based policymaking and socio-economic development. E-mail: rita.remeikiene@tf.vu.lt.

16. **Giedrė Lastauskienė** is a doctor of law and associate professor at the Law Faculty of Vilnius University, Judge of the Constitutional Court of the Republic of Lithuania, researcher in the fields of Legal theory, legal philosophy, legislation, constitutional law, and legal ethics. E-mail: giedre.lastauskiene@tf.vu.lt.

17. **Dace Šulmane** is a doctor of Law and Associate Professor, Faculty of Law, Turiba University, Latvia. E-mail: dace.sulmane@turiba.lv.

18. **Rodica Ciobanu** is a doctor of Law and Associate Professor, Faculty of Law, Moldova State University, Moldova. E-mail: rodica.ciobanu@usm.md.

19. **Remigijus Merkevičius** is an attorney-at-law, Associate Professor at the Department of Criminal Justice of the Faculty of Law at Vilnius University. He is one of Lithuania's leading experts in criminal procedure law. His academic and professional work focuses on criminal procedure, human rights, and defence in criminal proceedings. He is the author of numerous scientific publications and monographs and is an active legal expert in the public sphere. E-mail: remigijus.merkevicius@tf.vu.lt.

20. **Evaldas Raistenskis** is a Senior Researcher at the Department of Criminal Justice of the Faculty of Law at Vilnius University. His research interests include criminal justice, economic and financial crime, corruption, money laundering, cigarette smuggling, the shadow economy, and the impact of illicit activities on socio-economic development. He has participated in numerous international research projects and has authored and co-authored scientific publications examining the relationships between corruption, smuggling, money laundering, and economic well-being. E-mail: evaldas.raistenskis@tf.vu.lt.

Reviewers

1. **Jonas Prapiestis** – Professor, PhD at the Law Faculty of Vilnius University, Vilnius, Lithuania.

2. **Mykhaylo Shepitko** – Professor, dr. hab. at the Law Faculty of Yaroslav Mudryi National Law University, Kharkiv, Ukraine.

List of Tables and Figures

Donatas Murauskas, Charles Szypszak
Criminal and Administrative Liability Confounded…
Table 1. The delineation of civil-criminal offences in Europe and the United States 28

Ramunė Žiedė, Ramūnas Birštonas
Problems of the Distinction Between Different Types of Legal Liability for Misappropriation of Authorship
Table 1. Volume of case law in civil cases by keywords 67
Table 2. Volume of case law in administrative cases by keywords 71
Table 3. Investigations of administrative offences conducted by the OAEP Service pursuant to Article 123 of the CAO 73
Table 4. Volume of case law in criminal cases by keywords 79

Dace Šulmane, Gabrielė Juodkaitė-Granskienė, Rodica Ciobanu
Disciplinary Responsibility of Judges for Breaches of Ethics…
Table 1. Limitation periods for initiating disciplinary proceedings and competent authorities 237
Table 2. The legal basis for disciplinary liability 239
Table 3. Distribution of disciplinary proceedings initiated against judges in 2012 (Q144) 243

Gabrielė Juodkaitė-Granskienė, Andrej Gorbatkov
Forensic Expertise, Liability, and Insurance…
Table 1. Rules relating to the liability and insurance of experts 256
Table 2. Results of a comparative analysis of selected ECtHR cases related to expert activities 265

Justyna Levon, Dovilė Valančienė
The Intersection of Neuroscience and Criminal Law...
Figure 1. PRISMA flowchart of article search and collection 155

This collective monograph explores contemporary legal challenges at the intersection of criminal, administrative, and civil law in Lithuania, Europe, and beyond. Bringing together the perspectives of scholars, judges, practicing lawyers, and other legal experts, it examines the boundaries between different forms of legal liability, the legal implications of artificial intelligence and neuroscience, and the role of national and international court jurisprudence in shaping applicable legal standards. Through comparative analysis of legal systems and practices, the book addresses pressing questions arising from social, technological, and other changes, identifying existing legal problems and proposing potential solutions. It offers valuable insights for legal scholars, practitioners, and anyone interested in the development of law in a changing world.

https://akademicka.pl

KSIĘGARNIA AKADEMICKA PUBLISHING

ISBN 978-83-8368-531-1