The Principle of Justice and the Realisation of Criminal Liability

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Introduction

Within a harmonious system of legal principles, principles of criminal liability form a constituent part determining a specific line of criminal law. The way itself in which these principles are termed already indicates that they are attributed to a certain area of law, i.e. criminal law. These principles comprise the fundamental provisions of criminal law, upon which, as a rule, other most important institutes of this area of law are founded. Principles of criminal liability ensure the internal consistency and agreement (non-contradiction) among the norms pertaining to the area of law at issue. Similarly to other legal principles, they acquire the essential meaning when the norms of criminal law are being applied, executed, or otherwise realised. While following the general definition of legal principles,[1] *principles of criminal liability can be defined as the principal, supporting ideas, the essential legal beginnings, which determine and express the essence and purpose of criminal liability*.

Principles of criminal liability are not, normally, directly regulated in the Lithuanian criminal law, and they do not have any conventional and strictly structured expression of a norm (hypothesis, disposition, and sanction). Mostly, they are disclosed while assessing the concept of criminal liability, while construing certain provisions of laws, or while considering other legal principles. The principles at issue are directly linked to the perception prevailing in the state with regard to the concept of criminal liability and the moments of its emergence and expiry, to the coherent system of legal norms, as well as to the internal agreement, or non-contradiction, intrinsic

[1] The fundamental provisions of law and of the system of law—upon which the entire legal regulation is founded and all legal decisions (both general and individual ones) are based—are, as a rule, regarded as legal principles. These principles form the foundation for the entire system of law, and they reveal the meaning and purpose of laws, while being knowledgeable about them enables one to get thoroughly acquainted with and assess the contents of legal norms.

to this system, which ensures the proper realisation of liability. Attention should be paid to the fact that for a long period of time in the soviet doctrine the opinion prevailed that only the principles consolidated in a law could be regarded as the principles of criminal liability and criminal law. For instance, according to S. Kelina and V. Kudriavtsev, a principle must be incorporated into the text of a law itself, or must be included among the norms of the general and special parts of the Criminal Code.[2] In the majority of world countries, however, they are not concretely indicated in the respective criminal laws, but they rather tend to arise from the contents of laws or from the notional context of these laws.

In this article, an attempt is made, in terms of criminal liability, to pay greater attention to one of the central general principles—the principle of justice. Formerly, this principle used to be recognised as a general legal principle, or it used to be considered only within the doctrine of criminal law; however, following the adoption of the new wording of the Criminal Code of the Republic of Lithuania (hereinafter also referred to as the CC) and its entry into force on 1 May 2003, this principle for the first time became a norm of criminal law. It has come to be consolidated not only in the general notional context of the criminal law, but it has also come to be concretely emphasised by the legislator even in two articles of the CC: firstly, in Article 41, where the purpose of a penalty is determined, and where it is indicated that a penalty must ensure the implementation of the principle of justice; and secondly, in Paragraph 3 of Article 54, where it is *expressis verbis* consolidated that, if the imposition of the penalty provided for in the sanction of an article is evidently in conflict with the principle of justice, a court may, taking into consideration the purpose of the penalty, impose a commuted penalty based on a reasoned decision.

It is necessary to acknowledge that, for the legislator and in the practice of courts, the consistent implementation of the requirements of the principle of justice is not a simple task. This is true particularly because of the fact that the former criminal policy of the soviet occupation period is still exerting a strong influence on the traditions and culture of the state, as well as on the attitude of its society towards the punishment of a person.[3]

In their publications Lithuanian lawyers at least briefly touch upon the issue of the implementation of the principle of justice nearly in every monograph or a textbook in which

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[2] Келина С. Г., Кудрявцев В. Н. *Принципы советского уголовного права [Principles of Soviet Criminal Law]*, Москва: Наука, 1988, pp. 28–29. It is perhaps for this reason that the first chapter of the general part of the Russian Criminal Code specifically provides for and discusses such key principles as: the principle of legality (Article 3), the principle of the equality of citizens before the law (Article 4), the principle of guilt (Article 5), the principle of justice (Article 6), and the principle of humanism (Article 7) (*Уголовный кодекс Российской Федерации: официальный текст [The Criminal Code of the Russian Federation: Official Text]*. Москва: Омега-Л, 2004, pp. 9–10).

[3] Kuklianskis, S; Gimelstein, R.; Justickis, V. 2005. Psichologinė bausmės samprata [A Psychological Concept of a Penalty]. *Socialinis darbas*, 2005, No. 4(2), pp. 50–59. Sakalauskas G. *Baudžiamoji politika Lietuvoje: tendencijos ir lyginamieji aspektai [Penal Policy in Lithuania: Tendencies and Comparative Aspects]*. Teisės institutas, 2012.

questions of criminal liability are examined (R. Drakšas, V. Piesliakas, G. Sakalauskas, G. Švedas, etc.). At the same time one needs to mention that in the doctrine of the criminal law of foreign countries the principle of justice has been analysed rather extensively, as, for example, by professors A. von Hirsch and A. Ashworth, as well as G. F. Cole, C. M. V. Clarkson, H. M. Keating, S. G. Kelina, V. N. Kudriavtsev, G. Lembert, L. Maher, J. Roberts, C. E. Smith, E. Schmidthauser, etc.

Though it would be possible to continue with further survey of the authors on the issue under discussion, the present article, nevertheless, sets no objective of analysing the whole body of legal literature, nor that of providing a thorough comment on scientific works on the subject. Yet it makes an attempt to analyse separate questions related to the implementation of the principle of justice in the course of the realisation of criminal liability, which so far have received no comprehensive examination in publications of Lithuanian scientists, and, therefore, call for closer scientific consideration and more in-depth discussion.

The Principle of Justice and the Criminal Law

It is beyond any doubt that justice, first of all, means a just criminal law, which, in its turn, provides conditions for creating the uniform practice of courts.[4] A court obeys only the law,

[4] In the ruling of 16 January 2006, the Constitutional Court of the Republic of Lithuania indicated the following principal requirements with respect to the legislator and other law-making subjects: law-making entities may pass legal acts only without exceeding their powers; the requirements established in legal acts must be based on the provisions of general type (legal norms and principles), which can be applied with regard to all specified subjects of the respective legal relations; any differentiated legal regulation must be based only on the objective differences of the situation of the concerned subjects of the public relations regulated by the respective legal acts; in order to ensure that subjects of legal relations would be aware of the requirements put forward with respect to them by legal norms, the legal norms must be established in advance, the legal acts must be published officially, and they must be public and accessible; the legal regulation established in laws and other legal acts must be clear, easy to understand, and consistent; formulas in legal acts must be explicit, consistency and internal harmony of the legal system must be ensured, legal acts may not contain any provisions at the same time regulating the same public relations in a different manner; in order that subjects of legal relations could orient their behaviour according to the requirements of law, the legal regulation must be relatively stable; legal acts may not require the impossible (*lex non cogit ad impossibilia*); the power of legal acts is prospective, while retrospective validity of laws and other legal acts is not permitted (*lex retro non agit*) unless a legal act mitigates the situation of a subject of the legal relations and does not injure by the same other subjects of the legal relations (*lex benignior retro agit*); violations of law for which liability is established in legal acts must be clearly defined; when establishing legal restrictions and liability for violations of law, one must pay heed to the requirement of reasonableness and the principle of proportionality, according to which the established legal measures must be necessary in a democratic society and suitable for achieving the legitimate and universally important objectives (there must be the balance between the objectives and measures), they may not restrict the rights of a person more than it is necessary in order to achieve the said objectives, and if these legal measures are related to the sanctions for the violation of law, in such a case the said sanctions must be proportionate to the committed violation of law; when legally regulating public relations, it is compulsory to pay heed to the requirements of natural justice comprising *inter alia* the necessity to ensure the equality of persons before the law, the court, and state institutions and officials; when issuing legal acts, one must pay heed to the procedural law-making requirements, including those established by a law-making entity itself; etc. See the Ruling of the Constitutional Court of the Republic of Lithuania "On the Compliance of Paragraph 4 (Wording of 11 September 2001) of Article 131 of the Code of Criminal Procedure of the Republic of Lithuania with the Constitution of the Republic of Lithuania, on the Compliance of Paragraph 5 (Wordings of 10 April 2003 and 16 September 2003) of

therefore, it is obliged to make the freedom granted to it by the law correspond to the uniform practice of choosing and imposing penal measures, whatever a judge's mood or the place and time of the consideration of the case. In its ruling of 10 June 2003, the Constitutional Court concretely held: "The principle of natural justice consolidated in the Constitution presupposes that penalties established by a criminal law must be just. The constitutional principles of justice and a state under the rule of law imply *inter alia* that the measures applied by the state must be adequate to the sought objective. Thus, penalties must be adequate to the criminal deeds for which they have been established; and it is not permitted to establish any such penalties for criminal deeds, nor any such an extent of these penalties, that would be obviously inadequate to the criminal deed and the purpose of the penalty".[5]

In the context of criminal liability the implementation of the principle of justice is also important during a pre-trial investigation when the criminal law and the law on criminal procedure are concretely applied. It needs to be emphasised that, under the Code of Criminal Procedure of the Republic of Lithuania (hereinafter also referred to as the CCP) in its new wording, a pre-trial investigation must be instituted when there is at least the slightest ground to believe that a criminal deed was committed. Therefore, even when there is only unverified information about a possibly committed criminal deed, a pre-trial official has no obstacles to carry out certain procedural actions. If, while carrying out the said actions, one disregards the principle of justice, this may lead to violations of human dignity, violations of the inviolability of private life, as well as of other rights and freedoms. The norms of the CCP are not a collection of the separate norms bearing no connection to the criminal law. Therefore, an investigator, prosecutor, or court should always draw on the system of norms and principles, which guarantees the implementation of the principle of justice when a person is being subjected to criminal liability.

It should be mentioned that the criminal laws of different states relating to the imposition of penalties and the implementation of the principle of justice are an area where most differences become evident. For example, in the system of common law one is, as a rule, guided by the principle "treat like cases alike", formulated by H. L. A. Hart. Thus, for instance, when a penalty is

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Article 234, Paragraph 2 (Wordings of 10 April 2003 and 16 September 2003) of Article 244, Article 407 (Wording of 19 June 2003), Paragraph 1 (Wording of 14 March 2002) of Article 408, Paragraphs 2 and 3 (Wording of 14 March 2002) of Article 412, Paragraph 5 (Wording of 14 March 2002) of Article 413, and Paragraph 2 (Wording of 14 March 2002) of Article 414 of the Code of Criminal Procedure of the Republic of Lithuania with the Constitution of the Republic of Lithuania, and on the Petitions of the Šiauliai District Local Court, the Petitioner, Requesting to Investigate whether Article 410 (Wording of 14 March 2002) of the Code of Criminal Procedure of the Republic of Lithuania is not in Conflict with the Constitution of the Republic of Lithuania" of 16 January 2006. Official Gazette *Valstybės žinios*, 2006, No. 7-254.

[5] Ruling of the Constitutional Court of the Republic of Lithuania of 10 June 2003 "On the Compliance of Article 45 (Wording of 2 July 1998) and Paragraph 3 of Article 312 (Wording of 3 February 1998) of the Criminal Code of the Republic of Lithuania with the Constitution of the Republic of Lithuania". Ibid., 2003, No. 57-2552.

being imposed in the United Kingdom, justice is sought not by invoking analogous penalties, but by drawing on the like assessment of certain circumstances of the case.

In the framework of the doctrine of the Lithuanian criminal law the position closest to the aforesaid provisions is taken by V. Piesliakas. He maintains, with good reason, that there are three aspects of justice: 1) justice as the activity of the legislator in establishing criminality of human actions and sanctions for criminal deeds; 2) justice as the activity of a court in examining criminal cases and imposing the enforcement measures provided for by law; and 3) justice as an aspiration to achieve a uniform penal policy. "Analogous crimes, committed under analogous conditions, must be punished in an analogous way. If a judge assesses analogous crimes differently, thus, also punishes guilty persons differently, no matter strict or mild the penalty is, this will not be justice. This is anarchy, which breeds abuses and other evils <...>".[6] These ideas can be associated on close terms with formal justice. According to D. Lloyd, a representative of English legal philosophy, formal justice can be perceived by invoking three interrelated conceptions: first, there must be norms establishing as to how in concrete cases it is necessary to behave with people; second, the said norms, by their nature, must be universal, i.e. they must provide that every person falling under their operation is obliged to execute them; and third, justice requires that the said general norms are applied impartially, i.e. institutions executing these norms are under the obligation to apply them by avoiding any discrimination, coercion, or, on the contrary, particular concessions. Thus, no exceptions may be made for any person falling under the operation of the said norms.[7]

It stands to reason that, once a system of norms is being created, it must be objectively and universally applicable, as the validity of a norm, as rightly observed by H. Kelsen, is "what ought to be rather than what is". Therefore, justice is, primarily, a just criminal law, which provides conditions for creating the uniform practice of courts.

Nonetheless, in the course of law-making the legislator must establish a scale of values, which would enable one to take into consideration different members of society as well as their capabilities. No system of such values may be created on the sole basis of formal justice, since such a system should be, by causal link, related to the consequences ensuing upon the application of a norm. Therefore, bare formal justice may lead to actual injustice. For example, for a committed theft, either a thirty-ear-old or fourteen-year-old person would be subject to the same custodial sentence. Thus, the principle of justice in itself does not deny the fact that different legal regulation

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[6] Piesliakas V. *Lietuvos baudžiamoji teisė [Lithuanian Criminal Law]*, Book 1, p. 101; Piesliakas V. Bausmių skyrimo nuostatų tobulinimo problemos [Problems in Improving Provisions Regarding the Imposition of Penalties]. *Teisės problemos*, 1996, No. 2, p. 8.

[7] Ллойд Д. *Идея права: репрессивное зло или социальная необходимость [The Idea of Law: A Repressive Evil Or Social Necessity]*, Москва: Югона, 2002, pp. 137–138.

may be established with respect to certain categories of persons who are in different situations. The legislator, while providing for the legal norms and the enforcement measures ensuring the observance of those norms, draws, as a rule, on the concept of justice and presumes that a law that is being enacted can, in substance, guarantee the implementation of the principle of justice. An adopted law, however, is not, in itself, necessarily just; therefore, it is open to criticism and proposals that it be amended. This can also be proved by the modifications made to the new CC. For instance, the CC, as approved by the Law (No. VIII-1968) of 26 September 2000 and after having entered into force only as from 1 May 2003, had been, until 2 July 2013, i.e. during the 10 years of its existence, modified as many as 47 times.[8] The legislator had introduced modifications to 213 articles, from which 83 articles had been modified twice, 19 articles—three times, 6 articles—four times, and 3 articles more than five times. Alongside, the legislator had supplemented the code by 36 entirely new articles, criminalising new deeds. The said modifications, in substance, show that the penal policy in Lithuania has been gradually made more stringent, while seeking to solve all of the problems by means of criminal law. Hence the question may arise whether making the penal policy more stringent is in line with the principle of justice consolidated in the CC.

It needs to be held that an essential feature—humanisation of criminal liability measures—of the CC, as approved on 26 September 2000, is being gradually abandoned in Lithuania. For example, initially, there was the provision consolidated therein whereby penal sanctions could be imposed only on an adult person released from criminal liability or released from a penalty (Article 67 of the CC in its wording of 26 September 2000). An exception was applied only with respect to confiscation of property, which could be imposed in conjunction with a penalty. After the period of ten years, not only the list of penal sanctions was extended, but it was also prescribed that, in addition to a penalty, a person who has committed a criminal deed may be subject to one or more penal sanctions—a prohibition to exercise a specific right, deprivation of public rights, deprivation of the right to be employed in a certain job or engage in a certain activity, confiscation of property, prohibition to approach the victim, participation in the programmes addressing violent behaviour, and an extended confiscation of property. The fact of making the criminal law more stringent is also attested to by the increasingly rising minimum and maximum measures of a penalty provided for in the sanctions of the Special Part of the CC, also by increasing qualified corpus delicti of crimes in the Special Part of the CC, etc. Thus, upon the adoption of the new CC, the internally harmonised homogenous body of norms is today increasingly becoming more fragmented or even characterised by contradictory legal regulation of public relations. Naturally, as times change, every criminal law

[8] In order to remain objective it is necessary to mention that for the purposes of implementing legal acts of the European Union the CC was modified as many as 26 times.

undergoes changes as well and, thus, is subject to a continuous development. At the same time the contents of the principle of justice is also changing, however, all this should not be taking place solely on the basis of the idealisation of the capacity of the criminal law, by following the provision *fiat iustitia, pereat mundus* (let there be justice, though the world perish). A constant change of the criminal laws obviously makes the application of these laws more complicated, as officials of law-enforcement institutions, having applied a new law to a concrete actual situation, often assign to it a quite different meaning than that constructed by the legislator. In such a situation one, more often than not, tends to exploit the public opinion and the public interest, rather than to be guided by the principle of justice consolidated in the law. Criminological research, however, shows that the majority of the Lithuanian public remain sufficiently tolerant with respect to minor and less serious crimes, while the argumentation of harm-based retributive psychology (according to which, the public, purportedly, calls for stringency in regulation of criminal liability) used in the public sphere amongst politicians or certain law-enforcement officials at times stems more from their personal experience or subservience to an opinion expressed in the media, rather than from the scientifically grounded research on public opinion.[9]

Consequently, in its ruling of 4 June 2012, the Constitutional Court with good reason held that the constitutional principles of justice and a state under the rule of law imply that the measures established by the state for violations of law must be proportionate (adequate) to the violation of law, also that these measures must be in line with the legitimate and generally important objectives being sought, and that they may not restrict the person clearly more than it is necessary in order to reach these objectives. It is not allowed to establish any such legal regulation (penalties or their extent) in a criminal law on the basis of which a court, while taking account of all the circumstances of the case and while applying the criminal law, would not be able to individualise the punishment that is being imposed on a concrete person for a concrete criminal deed.[10]

Regardless of that, in the opinion of some authors (N. Ashford, V. Nažimovas), by faultlessly following the established requirements of the norms of criminal law, it is possible to adopt an impartial and lawful, thus, also just decision.[11] While not dismissing the necessity of ensuring the lawfulness of the decisions adopted by a court, one is still led to believe that this alone does not yet guarantee the implementation of the principle of justice in the course of the imposition

[9] Dobryninas A., Drakšienė A., Gaidys V., Vileikienė E., Žilinskienė L. Pasitikėjimo Lietuvos teisėsauga profiliai [Profiles of the Trust in Lithuanian Law Enforcement]. Vilniaus universiteto leidykla, Vilnius, 2012, p. 349.

[10] Ruling of the Constitutional Court of the Republic of Lithuania "On the Compliance of Item 3 (Wording of 12 June 2008) of Paragraph 2 of Article 129 and Item 3 (Wording of 12 June 2008) of Paragraph 2 of Article 135 of the Criminal Code of the Republic of Lithuania with the Constitution of the Republic of Lithuania" of 4 June 2012. Official Gazette *Valstybės žinios*, 2012, No. 64-3246

[11] It should be mentioned that in the soviet doctrine of criminal law justice was equated with lawfulness, thus, sentence was also mostly subject only to the requirements for lawfulness and validity.

of a penalty. Furthermore, the notions of lawfulness and justice should not be equated. Both of these principles are essential and they complement each other; therefore, every imposed penalty must be lawful and just.

Without any doubt a court obeys only the law; therefore, it is under the obligation to make the freedom granted to it by the law correspond to the uniform practice of choosing and imposing penal measures, regardless of a judge's mood or the place and time of the consideration of the case. In Paragraph 1 of Article 14 of the International Covenant on Civil and Political Rights it is emphasised: "All persons shall be equal before the courts and tribunals. <...> everyone shall be entitled to a fair and public hearing by a competent, independent, and impartial tribunal established by law".[12] In that provision one may evidently discern the foundation for the justice declared in the Preamble to this document. The requirement that the courts and tribunals treat all persons as equal implies an objective consideration of a case and, first of all, the fact that every person has the right to judicial defence and enjoys the equality of rights when a case is considered in a court (i.e. enjoys the right to declare removals, present evidence, submit requests, file a complaint against decisions of a court, etc.), also that norms of the criminal law must be applied to all persons in an equal manner, etc. The requirement that a court be "competent" means not only that there must a certain competence of a court consolidated by law to consider a case, but also that a court is obliged to base its decisions on the comprehensive and objective examination of the circumstances in the case, also that a penalty may be inflicted only on a guilty person, while a person may be recognised as being guilty only upon establishing that a criminal deed has been committed, as well as that courts alone have exclusive right to administer justice, etc.

Thus, while applying the principle of justice, one is, first of all, required to strictly observe the requirements laid down in international documents and national criminal laws. In addition, the principle of justice implies the duty of a court not to blindly apply a law, but, among other things, to ascertain whether the prohibitions and requirements set out in a law comply with the Constitution, whether they do not infringe any innate human rights and freedoms, whether the sanctions consolidated in the CC enable it to properly individualise a penalty, etc.[13]

[12] 1966 m. gruodžio 19 d. Tarptautinis pilietinių ir politinių teisių paktas [International Covenant on Civil and Political Rights of 19 December 1966]. Official Gazette *Valstybės žinios*, 2002, No. 77-3288, p. 23.

[13] Therefore, where doubts arise regarding the compliance of a law with the Constitution, courts should apply to the Constitutional Court, so that the latter would establish whether the provisions of the criminal law consolidated by the legislator are not in conflict with the Constitution.

It needs to be stressed that the implementation of the principle of justice is closely related to the proportionality of a penalty imposed on a guilty person.[14] Justice is primarily an optimal, necessary in terms of rectification, type of a penalty, as well as its extent, established by law. At the same time justice is also understood as the maintenance of the solidarity of interests, and this presupposes that the enforcement measures imposed for the committed criminal deeds must be proportionate (adequate) to the violation of law, that they must be in line with the legitimate and generally important objectives being sought, and that they may not restrict the person clearly more than it is necessary in order to reach these objectives. In the ruling of 10 June 2003, the Constitutional Court held that the principle of natural justice consolidated in the Constitution implies that penalties established by a criminal law must be just. The constitutional principles of justice and a state under the rule of law mean *inter alia* that the measures applied by the state must be adequate to the sought objective. Thus, penalties must be adequate to the criminal deeds for which they have been established; and it is not permitted to establish any such penalties for criminal deeds, nor any such an extent of these penalties, that would be obviously inadequate to the criminal deed and the purpose of the penalty.[15] While agreeing with this Constitutional Court's provision, it is still necessary to note that the proportionality of penalties and other measures, as provided for in the criminal law, to the dangerousness of the committed criminal deed (proportionality provided for by the law) is, as a rule, relative, since, while constructing sanctions for certain deeds, the legislator is guided by political, ideological, material, moral, and other utilitarian criteria. Therefore, a court may ensure the implementation of the principle of justice only by individualising a penalty with respect to a concrete person for a certain committed criminal deed.

The Guarantee of the Implementation of the Principle of Justice as an Objective of a Penalty

Most of the objectives of a penalty, as provided for by the CC, have been more than once examined in the doctrine of Lithuanian criminal law. But the objective of ensuring the implementation of the principle of justice is a recent development in the criminal law, as the

[14] The principle of proportionality is one of the general legal principles, which in the doctrine of criminal law is frequently termed as the principle of the economy of a penalty (V. Pavilonis) or referred to as the prohibition of excessive coercion.

[15] Ruling of the Constitutional Court of the Republic of Lithuania "On the Compliance of Article 45 (wording of 2 July 1998) and Paragraph 3 (wording of 3 February 1998) of Article 312 of the Criminal Code of the Republic of Lithuania with the Constitution of the Republic of Lithuania" of 10 June 2003. Official Gazette *Valstybės žinios*, 2003, No. 57-2552.

previously valid wording of the CC did not contain any mention of such a purpose being sought through a penalty, therefore, it requires further elucidation.

The principle of justice is a general principle, which is inherent to all branches of law, and which has an essential meaning not only in legislation, but also in the process of the application of legal acts. In that respect, it acquires specific peculiarities, determined by the necessity to ensure the imposition of such a properly individualised penalty on a guilty person that would best serve the purpose of the penalty provided for by the law. The principle at issue reflects the core legislator's idea, which can be defined as an objective sought by the establishment of the main directions of the certain practical activity of courts in the course of imposing penalties. There is no general point of view in the doctrine of Lithuanian criminal law regarding the principle of justice and its contents. Consequently, the concept of a just penalty may be many-sided. It is often based on the perception of concrete justice or injustice. It should be mentioned that the questions related to the concept of justice have been tackled in various aspects in the works of philosophers, theologians, and lawyers. For instance, the Roman Emperor Justinian defined justice as the necessity "to render to every one his due". The conception of justice created in the Western theology was based on the doctrine of the atonement, under which justice, purportedly, required that every sin (crime) be paid for by temporal suffering; that the suffering, i.e. the penalty, be appropriate to the sinful act; and that it vindicate ("avenge") the particular law that was violated.[16]

According to H. L. A. Hart, diverse applications of the idea of justice are founded on the general principle that individuals are entitled in respect of each other to a certain position of equality or inequality. "Hence justice is traditionally thought of as maintaining or restoring a balance or proportion, and its leading precept is often formulated as 'Treat like cases alike'; though we need to add to the latter 'and treat different cases differently'."[17]

To continue, N. Ashford's position may be found to be of further interest. According to him, justice "is about the rules that distribute rewards and punishments, that each person should be given their due".[18] In Ashford's opinion, the concept of justice is threatened, among other things, by judicial activism, when judicial decisions simply reflect the preferences and prejudices of the judges, their personal view of what is right or wrong. "This is the rule of men, not laws"—as the author maintains.[19] Thus, the latter position highlights the requirement that a judicial decision must be impartial (objective) and based on the adopted legal norms. In the light of this view, one may be

[16] Berman H. J. *Teisė ir revoliucija: Vakarų teisės tradicijos formavimasis [Law and Revolution: The Formation of the Western Legal Tradition]*, Vilnius: Pradai, 1999, pp. 247–248.
[17] Hart H. L. A. *Teisės samprata [The Concept of Law]*, Vilnius: Pradai, 1997, p. 267.
[18] Ashford N. *Laisvos visuomenės principai [Principles for a Free Society]*. Vilnius: Aidai, 2003, p. 68.
[19] Ibid., p. 69.

led to believe that valid laws must be faultless in order they could ensure the implementation of justice.

It is obvious that the implementation of the principle of justice is aimed at achieving the following: sentencing the person; imposing a just penalty, which would be proportionate to the committed criminal deed and the personality of the guilty person; and redressing the harm inflicted through the committed criminal deed. The practice, however, shows that ensuring the implementation of the principle of justice is a rather complicated task. First of all, criminal deeds are of great latency, due to which persons remain altogether unpunished for their committed criminal deeds. Scientists claim that latent crimes may 3–5 times exceed the figure of the crimes officially registered in the country. An actual figure for the law offenders is, as a rule, 5–7 times higher than that for the identified offenders or their accomplices.[20] Second, a large part of society has no trust in courts and the judgments adopted by them. For example, the criminological research carried out in 2011 indicates that Lithuania, as well as Bulgaria, are amongst those countries where trust in the system of law is lowest. It needs to be emphasised that as many as the third part of the residents assess the activity of national courts in ensuring the person's right to a fair consideration of the case as being poor and very poor.[21] Third, the right to the implementation of justice and to the redress of the harm inflicted on every victim as a result of a criminal deed is guaranteed to the person not only in the criminal law, but it is also consolidated under the Convention for the Protection of Human Rights and Fundamental Freedoms, as well as Article 30 of the Constitution of the Republic of Lithuania. The aforesaid criminological research also revealed that the residents of Lithuania recognise that reimbursement for, as well as removal of, property damage is an effective remedy (confirmed by 87 percent of the respondents).[22] Nonetheless, as the practice discloses, damage to full extent is reimbursed to the victim on quite few occasions. The material damage of the victim is generally awarded in courts without any long discussions, yet the problems occur regarding the actual implementation of the judgment, since a guilty party more often than not neither holds any property, nor receives any income. The problem is mostly faced in relation to reimbursement for non-property damage. The Constitutional Court emphasised that "moral damage is a spiritual offence, which can only be assessed and compensated materially on condition; quite often the inflicted moral damage, as the moral offence sustained by the person, cannot be in general replaced, because it is impossible to return back the psychological, emotional, and other condition

[20] Drakšienė A., Michailovič I. Kriminologijos žinynas [Reference Book on Criminology]. Vilnius, Eugrimas, 2008, p. 90.
[21] Dobryninas A., Drakšienė A., Gaidys V., Vileikienė E., Žilinskienė L. Pasitikėjimo Lietuvos teisėsauga profiliai [Profiles of the Trust in Lithuanian Law Enforcement]. Vilniaus universiteto leidykla, Vilnius, 2012, p. 82.
[22] Ibid., p. 340.

of the person, which had existed before the spiritual offence took place—such condition sometimes (at best) can be newly created while using *inter alia* material (first of all, monetary) compensation for that moral damage".[23] Consequently, the redress of spiritual offence is more a moral-ethical category rather than that of criminal law. Accordingly, in this respect, one should address the implementation of the principle of social justice. In the latter cases, the boundaries of criminal law would be expanded as well, as to otherwise reach the objective of a penalty set out in the law—to fully implement the principle of justice—is obviously impossible. One is led to believe that, in order that the principle of justice is implemented, an amount of the non-property damage caused as a result of a criminal deed should be established for every victim individually, by paying heed to the criteria of proportionality and reasonableness, as well as by considering the ensuing consequences and the guilt of the guilty person, his situation as regards property, and other circumstances characterising his personality. It is similarly worth mentioning that the implementation of the principle of justice, as an objective of a penalty, also implies that the guilty person should, through the penalty imposed, be given a possibility of changing his way of life and his behaviour as well as of abstaining from the commission of new criminal deeds, i.e. be given a possibility for re-socialisation. Therefore, it is evident that the implementation of this objective should be linked to the applications of the norms of other branches of law.

At this point it is possible to consider one more problem-related question. If the objective of the implementation of the principle of justice implies that, through the imposed penalty, possibilities must be created for re-socialisation, also that the penalty must be proportionate to the committed criminal deed, is it not so that the objective of a penalty in question in itself comprises all the rest of the objectives of a penalty? Then, perhaps, it might be worth leaving out all the other objectives of a penalty enumerated under the criminal law, by confining to the sole objective of the implementation of the principle of justice. As mentioned in this article, every court decision/judgment must be, first of all, just. It is not for nothing that law is primarily associated with justice, while lawfulness should be the realisation of the striving for justice in the reality. In that case, then, punishment, as well as general and special prevention, should be regarded only as the constituent parts of the objective of the implementation of the principle of justice. Undoubtedly, this, so far, remains to be a question open for discussion, also, in substance, a new question, which

[23] Ruling of the Constitutional Court of the Republic of Lithuania "On Compensation for Damage Inflicted by Unlawful Actions of Interrogatory and Investigatory Bodies, the Prosecutor's Office, and a Court" of 19 August 2006. Official Gazette *Valstybės žinios*, 24/08/2006, No. 90-3529, amendment of 16/12/2006, No. 137.

cannot be fully dealt with in the present article. Despite that, in the authors' opinion, it is high time to raise the question itself.

The Principle of Justice and the Individualisation of a Penalty

Attention should be drawn to the fact that each criminal deed is committed in a concrete situation and under certain circumstances, which are often characteristic only of that particular situation. In addition, criminal deeds are committed by concrete persons, who possess individual features, which, similarly, in most cases characterise only those particular persons. In spite of that, the criminal law cannot foresee all circumstances; therefore, the dilemma arises as to whether the legislator is obliged to supplement the CC and make an effort to foresee therein all possible cases (which is, in practice, hardly possible), or whether it must to confer on courts the right, once a concrete situation has been assessed and the principle of justice consolidated by law is being observed, to adopt the most appropriate decision. It is not by accident that some specialists of criminal law are inclined to believe that the consolidation of the principle of justice in the aspect of the purpose of a penalty is linked by the legislator to the public interest, by heeding which, a court is allowed to approach the penalty not only through the prism of the guilty person and the criminal deed, but also through the prism of the public interest, which cannot be always reflected by criminal laws. One could agree with such a view of the application of the principle of justice and of the contents of this principle, however, doubts arise whether such a way of treatment of the principle at issue would not lead to the formation of the non-uniform practice of courts, when analogous cases, considered by different judges, will be solved in a different manner. Thus, N. Ashford's concerns are understandable when he writes: "Supporters of judicial activism <...> measure decisions in terms of the consequences rather than the method by which they are arrived at. There is concern that judges, from the lowest courts in Europe up to the European Court of Justice of the EU, are following this approach. It is a threat to justice because it undermines the rules of justice as commonly understood. It reduces the predictability of how courts will decide any conflicts".[24]

The position in the Lithuanian court practice most clearly reveals itself in those cases when courts on well-reasoned grounds apply to the Constitutional Court regarding the compliance of the provisions of the criminal law with the Constitution. For instance, the Court of Appeal of Lithuania and the Panevėžys Regional Court, when applying to the Constitutional Court, by a ruling, requesting to investigate whether Paragraph 4 (wording of 2 July 1998) of Article 45 and the

[24] Ashford N. *Laisvos visuomenės principai [Principles for a Free Society]*, p. 72.

minimum punishment of five-year imprisonment established in Paragraph 3 (wording of 3 February 1998) of Article 312 of the CC were not in conflict with Paragraph 2 of Article 31 of the Constitution and the principle of a state under the rule of law, consolidated in the Constitution, emphasised that the persons who committed crimes must be punished justly, i.e. the imposed penalty must depend on the significance of the value protected by the criminal law, the nature of the crime committed, its consequences, the degree of the dangerousness of the person who violated a law, and other important circumstances. In the petitioners' opinion, justice means not only that the circumstances important to the case are established in an exhaustive, thorough, and objective manner, but also that the penalty imposed on the person who is recognised guilty is adequate to the committed crime: the penalty for a criminal deed must correspond to the nature and degree of the danger of this deed.[25]

The principle of justice encourages a court also to take into consideration the interests of the defendant as well as the possibilities for his improvement. On the basis of the general grounds for the imposition of a penalty, a court should select for the guilty person such a penalty or other enforcement measure provided for in the law that would affect the person in the most positive way and would prevent the recidivism of criminal behaviour. Once there is a sufficient ground to believe that the objectives of the penalty will be reached without actually serving a sentence, the court may suspend the execution of the sentence (provided there are grounds and conditions established in the law). The court may also discharge the person from the penalty or criminal liability.

Nonetheless, while implementing the principle of justice, it is at the same time also necessary to take care, in every possible way, of the protection of the values (the life of a human being, his health, property, freedom, etc.) defended by the criminal laws. For example, in its ruling of 13 December 1993, the Constitutional Court stressed that "it cannot be stated, however, that society is just and human if criminals may act more freely than people who abide by laws".[26]

In passing, it needs to be mentioned that, in terms of the assessment of the implementation of the principle of justice in the course of the imposition of punishment, the following two positions have recently become distinct in the doctrine of Lithuanian criminal law.

V. Piesliakas, while defining the principle of justice in the sense of Paragraph 3 of Article 54 of the CC, maintains: "Justice, as the activity of a court in examining criminal cases and imposing

[25] Ruling of the Constitutional Court of the Republic of Lithuania "On the Compliance of Article 45 (Wording of 2 July 1998) and Paragraph 3 (Wording of 3 February 1998) of Article 312 of the Criminal Code of the Republic of Lithuania with the Constitution of the Republic of Lithuania" of 10 June 2003. Official Gazette *Valstybės žinios*, 2003, No. 57-2552.

[26] Ruling of the Constitutional Court of the Republic of Lithuania "On the Compliance of the Second Paragraph of Article 148 of the Criminal Code of the Republic of Lithuania and Items 1 and 2 of Article 93 of the Code of Criminal Procedure of the Republic of Lithuania with the Constitution of the Republic of Lithuania" of 13 December 1993. Ibid., 1993, No. 70-1320.

penalties and penal measures, is treated as follows: just punishment means such a penalty that has been imposed by taking a due account of the gravity of the committed criminal deed, the peculiarities of the committed crime, the subjective features (guilt, reasons) of the deed committed by the guilty person, as well as his personality, and the imposition of the said penalty does not violate the norms of the Criminal Code. This is the principal aspect of justice. If this does not exist, in that case neither the guilty person, nor society will be able to understand that the court has administered justice".[27] Thus, the author focuses attention on the following key paradigms: a) the necessity to observe all the provisions of the criminal law, b) to apply the said provisions with respect to all persons in the same manner, by taking account of the gravity of the committed criminal deed, the peculiarities of the committed crime, the subjective features (guilt, reasons) of the deed committed by the guilty person, as well as his personality.

To compare, works by G. Švedas provide no clear definition of the principle of justice. Yet, similarly to V. Piesliakas, he emphasises the necessity of seeking to achieve the objectives set out in the framework of the strategy of the penal policy opted for by the state and established under the criminal laws—"the application of the law according to the willpower of the legislator. <...> a person who has committed a crime must receive a just penalty; therefore, this process is one of the most complicated and most important stages of the implementation of criminal law". At the same time, the author stresses that the imposition of a penalty is a retrospective evaluation of the committed crime and a promising preventive prediction, thus, in his opinion, "the primary criterion to be considered by a court in choosing the type and the extent of a penalty should be the personality of the person guilty of committing the crime as well as the available circumstances aggravating and mitigating the liability. <...> the imposition of a penalty is not an end in itself: a penalty is imposed while seeking to achieve the objectives of a penalty established in the criminal law, the object of which is a human being. In this case, a penalty may meet the raised objectives only then when it is individualised, i.e. imposed by taking account of the features of the personality of the guilty person and his needs for re-socialisation".[28]

Both of the aforementioned authors unambiguously give the priority to just application of the criminal law, with an essential difference between starting points of their positions being that V. Piesliakas, in discussing the imposition of a penalty, emphasises the necessity to justly punish the person for the committed criminal deed, whereas G. Švedas links the imposition of a penalty not so much to the possibility of punishing the person, but to the necessity for his re-socialisation.

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[27] Piesliakas V. *Lietuvos baudžiamoji teisė [Lithuanian Criminal Law]*, Book 1, Vilnius: Justitia, 2006, p. 102.
[28] Švedas G. Baudžiamosios politikos tendencijos Lietuvos Respublikoje 1995–2004 metais [Tendencies of the Penal Policy in the Republic of Lithuania in 1995–2004]. *Teisė*, 2005, vol. 56, pp. 78–79.

Thus, the perception of a just penalty and the practical application of this principle may depend not only on the faultlessness of the adopted criminal laws, but also on the perception of every judge, applying the provisions of Article 41 and Paragraph 3 of Article 54 of the CC, as to what is just and what is not, on the judge's knowledge, moral criteria, and moral experience. In this respect, the position of the Senate of the Supreme Court of Lithuania, seeking to make the practice of courts uniform, is very important. Attention should be drawn to the ruling (No. 40) of 20 June 2003, wherein it is elucidated that a court is in each case obliged to specify those exceptional circumstances that make it believe that the imposition of the penalty provided for in the sanction of an article upon the person guilty of committing a concrete criminal deed would clearly contradict the principle of justice.[29] Thus, the Senate of the Supreme Court of Lithuania only indicates that the provision "where imposition of the penalty provided for in the sanction of an article is evidently in contravention to the principle of justice, a court may, taking into consideration the purpose of the penalty, impose a commuted penalty subject to a reasoned decision", consolidated by the legislator in the CC of the new wording, may, in substance, be applied only in exceptional cases, when a court, having applied other articles of the CC that regulate the imposition of a penalty and permit commuting a penalty, believes that the penalty that is being imposed is clearly not in line with the principle of justice. Deciding as to the contents of the principle of justice is left to the discretion of courts.

One may presume that the necessity, consolidated in the purpose of a penalty, to ensure the implementation of the principle of justice partly adjusts the contents of the provisions designed to regulate the imposition of a penalty when, in a concrete case, it is necessary to establish a different, individualised penalty for the guilty person. It needs to be emphasised that the principle at issue is applied not only while following the contents of the provisions of the concrete articles of the CC**,** but also while disclosing a broader legal context of the criminal law. Therefore, when elucidating the provisions of the law regarding the imposition of a concrete penalty, a court must, first of all, pay attention to the willpower of the legislator that is expressed and clearly established under those provisions—namely such as consolidated in the literal text and the notional context of the criminal law. The imposition of a penalty is an exclusive competence of a court. This is one of the most complex and most important stages of the implementation of the criminal law, which could be defined as a certain process during which a court chooses a concrete measure of compulsion, which is provided for in the criminal law, with respect to the person recognised being guilty of committing

[29] Ruling of the Senate of Judges of the Supreme Court of Lithuania (No. 40) "On the Practice of Courts in Applying the Norms of the Code of Criminal Procedure Regulating the Drafting of a Judgement" of 20 June 2003. *Teismų praktika*, 2003, No. 19, p. 206.

a concrete criminal deed. The principal task for a court at this stage is, while following the law, to comprehensively and objectively examine the material of a criminal case and to adopt a lawful, grounded, and just judgment. Consequently, while assessing the implementation of the principle of justice and that of the individualisation of a penalty in the course of the imposition of a penalty, consideration should be given to the fact that justice is a philosophical moral-ethical category adapted for the criminal law, while the individualisation of a penalty is a legal category;[30] the notion of justice is always broader compared to the notion of the individualisation of a concrete penalty, since the former covers the whole of the applicable norms of the CC; the principle of the individualisation of a penalty reveals those facets that must be taken into consideration by a court in the course of the imposition of a penalty on the guilty person, whereas the principle of justice elucidates as to how the contents of the circumstances indicated in the law should be assessed.

In all cases, a law-applying subject should devote effort in order to avoid subjectivity, which may emerge because of various circumstances as, for instance, in a situation when one is not quite correctly explaining to the press the public opinion on resonant crimes. As practice shows, more often than not a defendant, as well as his lawyer, is helpless and has no influence in correcting a preconceived subjective opinion of the court about the imposition of a concrete penalty. The legislator, while providing for the alternative, relatively defined sanctions and the high limits of the established minimum and maximum penalties, on the one hand, has attempted to avoid the imposition of unreasonably stringent penalties, however, on the other hand, the legislator, by extending the discretion of courts, has created the possibilities for courts to apply different penalties for the similar criminals deeds committed under similar circumstances. Therefore, courts, at times abusing the discretion conferred on them by the legislator, during the process of the imposition of penalties fail to avoid subjectivity and violate the principle of justice. This, consequently, diminishes the authority of both the criminal law and the decisions adopted by the court.

The danger of not a lesser degree is similarly posed during the implementation of the principle of justice by a formal bureaucratic approach that might be taken towards the imposition of a penalty, when no due consideration is given to living human beings, with whom one has contact. E. Fromm called this Eichmannism. He wrote: “Eichmann was an extreme example of a bureaucrat. Eichmann did not send the hundreds of thousands of Jews to their deaths because he hated them; he neither hated nor loved anyone. Eichmann ‘did his duty’: he was dutiful when he sent the Jews to their deaths; he was just as dutiful when he was charged simply with expediting their emigration from Germany. All that mattered to him was to obey the rules; he felt guilty only when he had

[30] Велиев С. А. *Принципы назначения наказания [Principles of the Imposition of a Penalty]*. Санкт-Петербург: Юридический центр Пресс, 2004, p. 308.

disobeyed them. <...> I am not saying that all bureaucrats are Eichmanns. In the first place, many human beings in bureaucratic positions are not bureaucrats in a characterological sense. In the second place, in many cases the bureaucratic attitude has not taken over the whole person and killed his or her human side."[31] One may presume that the situations that might be most dangerous during the implementation of the principle of justice include those situations when a court takes into account only a committed criminal deed, and regards the subject of that deed as a standard most frequently occurring case abstracted from statistical data and practical work experience. According to E. Fromm, "once the living human being is reduced to a number, the true bureaucrats can commit acts of utter cruelty, not because they are driven by cruelty of a magnitude commensurate to their deeds, but because they feel no human bond to their subjects".[32] The apt E. Fromm's arguments once again underline the idea that in the course of applying the principle of justice any subject applying criminal law is equally required to take into consideration the singularity of a human being and his ability to freely choose the way of acting in each concrete situation of his life. The behaviour of a human being may not be subject to any preconceived evaluation, not the application of any constructive notions.

While examining the problematic issues related to the concept of justice, one also needs to note E. Kūris' position. In his opinion, the notion of justice has a manifold meaning, and it is, therefore, a relative one. "To choose and <...> to consolidate one of a wealth of the concepts of justice would equal imposing it on those who enjoy the indisputable right to treat the idea of justice in their own way, to hold their own opinion on what is just and what is not".[33] Nonetheless, when the principle of justice is implemented in the course of the realisation of criminal liability, any law-applying subject is obliged to perceive justice not in an abstract philosophical manner, but to properly interpret the whole body of the provisions of the criminal law as well as the contents of these provisions, and to respond to a committed criminal deed. While seeking the truth, one needs to impartially and with due respect assess the circumstances of the case and base the investigation on the theory of criminal law as well as on the practice of courts: the degree of the dangerousness of the committed criminal deed, the form and type of the guilt, the reasons and aims of the committed criminal deed, the stage of the commission of the criminal deed, the personality of the guilty person, the form and type of the participation of the person as an accomplice in the commission of the

[31] Fromm E. *Turėti ar būti? [To Have or to Be?]* Kaunas: Verba vera, 2005, pp. 250–251.
[32] Ibid., p. 251.
[33] Kūris E. Konstitucinių principų plėtojimas konstitucinėje jurisprudencijoje [The Development of Constitutional Principles in the Constitutional Jurisprudence]. In *Konstitucinių principų plėtojimas konstitucinėje jurisprudencijoje = Rozwój zasad konstytucyjnych w prawoznawstwie konstytucyjnym [The Development of Constitutional Principles in the Constitutional Jurisprudence]*. Lietuvos Respublikos Konstitucinio Teismo ir Lenkijos Respublikos Konstitucinio Tribunolo konferencijos medžiaga [Conference Material], 2001 m. birželio 11–12 d., Neringa. Vilnius: Lietuvos Respublikos Konstitucinis Teismas, 2002, p. 73.

crime, the circumstances mitigating and aggravating the liability, as well as the attitude of the victim to the committed criminal deed and his evaluation of the guilty person.

Conclusions

1. In the course of the implementation of the principle of justice one is, first of all, required to strictly observe the requirements laid down in international documents and national criminal laws. A constant change of criminal laws, however, makes the application of these laws more complicated, while officials of law-enforcement institutions tend to assign a quite different meaning to these laws than that constructed by the legislator. The proportionality of the penalties and other enforcement measures provided for in the criminal law to the dangerousness of the committed criminal deed (proportionality provided for by the law) is, as a rule, relative, since, while constructing sanctions for certain deeds, the legislator is guided by political, ideological, material, moral, and other utilitarian criteria.
2. In the opinion of the authors, it might be worth leaving out all the other objectives of a penalty enumerated under the criminal law, by confining to the sole objective of the implementation of the principle of justice. Every court decision/judgment must be, first of all, just. It is not for nothing that law is primarily associated with justice, while lawfulness should be the realisation of the striving for justice in the reality. In that case, then, punishment, as well as general and special prevention, should be regarded only as the constituent parts of the objective of the implementation of the principle of justice.
3. The implementation of the principle of justice in the course of the individualisation of a penalty implies not an abstract philosophical perception of justice, but rather the proper interpretation of the whole body of the provisions of the criminal law. Any law-applying subject should impartially and with due respect assess the circumstances of the case, grounding the investigation on the theory of criminal law as well as on the practice of courts: the degree of the dangerousness of the committed criminal deed, the form and type of the guilt, the reasons and aims of the committed criminal deed, the stage of the commission of the criminal deed, the personality of the guilty person, the form and type of the participation of the person as an accomplice in the commission of the crime, the circumstances mitigating and aggravating the liability, as well as the attitude of the victim to the committed criminal deed and his evaluation of the guilty person.

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