TENDENCIES OF THE DEVELOPMENT OF THE LITHUANIAN CRIMINAL PROCEDURE LAW

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Abstract. The tendencies of the development of the Lithuanian criminal procedure within the recent twenty years, after Lithuania has regained its independence, are analyzed in the present article. The main factors which influence lawmaking in the sphere of criminal procedure as well as in the application of the criminal procedure norms are discussed. The constitutional imperatives and the human rights, fixed in international and the European Union agreements as the main factors determining the evolution of the law of criminal procedure are reviewed. It is stated that earlier, while amending or supplementing the Code of Criminal Procedure, the utmost attention used to the drawn to the legal tradition of the state, whereas the legal norms of the modern criminal procedure must be subordinated to the principles fixed in the Constitution. After having briefly reviewed the main tendencies of the development of criminal procedure, i.e. the constitutionalization and internationalization-europeization, the following conclusion is drawn: the mentioned tendencies have been producing a significant impact on the evolution of the Lithuanian criminal procedure after the restoration of independence and accession to the international treaties. However, the systemic and critical viewpoint towards the impact of the European Union law on the national law of criminal procedure is still missing.

Keywords: criminal procedure, tendencies of the evolution of criminal procedure, constitutionalization of criminal procedure, internationalization of criminal procedure, europeization of criminal procedure.
Introduction

After the restoration of independence of Lithuania, the reform of the legal system served as one of the challenges for the young state. It is natural that the Code of Criminal Procedure (hereinafter referred to as the CCP) as well as other codes which were adopted in the middle of the twentieth century remained to exist but constantly supplemented and amended. However, the majority of the researchers of criminal procedure perceive that if social reality changes, the attitude towards criminal deeds and the procedure of their investigation and hearing, for the regulation of which new criminal laws and criminal procedure laws are necessary, will change as well. In spite of the fact that the majority of the criminal procedure institutions were already reformed in the course of the validity of the old CCP (for example, regulation of the application of procedural compulsory measures, particularly, the arrest and of the accused person’s legal status used to be co-ordinated in compliance with international standards) and the new legal regulation (for example, the appeal and the cassation, the judicial control of the pre-trial investigation) was created, the adoption and the entry into force of the new CCP can be considered as the end of a certain stage of the development of the law of criminal procedure of Lithuania and as the beginning of the next stage. The creation of the law of criminal procedure has not only ceased with the adoption of the new CCP\(^1\), but has, actually, started because the decisions of individual nature (including the ones which are adopted in the course of the implementation of criminal procedure) activate the provisions of the primary sources of law, i.e. hitherto, the corresponding norms or principles used to be formally in force, while at present they also operate, namely, they are provided with possibilities for implementation.\(^2\) As the legal regulation of criminal procedure changes and new institutions or norms of criminal procedure appear, it is usually presumed that they are subordinated according to the principles of criminal procedure; the latter, in their turn, must be interpreted to assist in the single-minded striving for the assignment of criminal procedure. The assignment and aims of the positive criminal procedure, in their turn, are dynamic and are influenced by certain tendencies of the development of law. Several main tendencies which influence the evolution of criminal procedure will be analyzed in this article. Herein, the following tendencies of the development of criminal procedure are analyzed by applying the method of systemic analysis, the historical and comparative methods as well as the method of analysis of jurisprudence, i.e. constitutionalization, internationalization and europeization as well as differentiation.\(^3\)

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3 Differentiation of criminal procedure as well as consolidation of the alternative ways of settling criminal conflicts serve as one more vivid tendency of the evolution of criminal procedure. However, due to a limited extent of the article it will not be analyzed. See: Azubalytė, R. Alternatyvūs baudžiamojo konflikto sprendi-

The theoretical models of criminal procedure analyzed in the doctrine of criminal procedure had been serving for a long time as the grounds for the interpretation of the development of the criminal procedure of a particular state at a certain period of time and of its provisions. Practically speaking, all scholars of criminal procedure acknowledge that there are several types (abstract models) of criminal procedure which have their own principles and procedural forms determined by them.

According to the majority of researchers of criminal procedure, the common law has chosen the adversarial (accusatorial) system in the sphere of criminal procedure, whereas the Roman-German law gave preference to the inquisitorial system. In principle, the theoretical models of criminal procedure (the difference of which is based on the priority of criminal procedure as an activity), i.e. the crime control process or the due process, are not at variance with this system. The idea that suppression of crimes is the main purpose of criminal procedure serves as the grounds for the model of the crime control process. It could be characterized by efficiency, rapidity, the power of the police, informal procedures, the priority of the pre-trial investigation over the court. The model of the due process is based on the protection of individual freedoms and rights, because the theory of stigma is known and accepted as well as the threat of the loss of freedoms (as a result of the process) is evaluated. Thus, certain fair criteria which must protect the rights of the accused person and of the suspect are fixed in this model. Not so much efficiency, but reliability (of the proofs, procedures), adversariality, court as the fundamental place of decision-making, and formal procedures are typical of it. Despite of being criticized due to their unclear interrelation, disregard for the victim’s position in the criminal procedure and peremptory attribution of certain features to one or another model, nowadays these theoretical models are widely enough used while analyzing the problems of the law of criminal procedure.

Certain scholars devised two ideal forms of administering criminal justice: the hierarchical and the co-ordinate model. Certain scholars of comparative law single out...
the models of the criminal law and procedure being ruled by the ‘intensity’ of repression while regulating the criminalization of the deeds and the procedure of their investigation and hearing, i.e. the one which relies on repression and the other which does not accept it and, therefore, is inclined to depreciate its significance. Such differentiation is also not sufficiently precise, but, according to the authors, in reality the legislator selects either the policy of trust in repression (the authoritarian model) or the conditionally larger mistrust in it (the liberal model), as the grounds for lawmaking in each branch of criminal justice law.11

Besides other factors, it is exactly the spring of the inquisitorial procedure that defines the authoritarian type of the process, and it is the spring of the adversiarial (accusatorial) process that defines the liberal type of the process.

After having acknowledged that there are several types of the process, several presumptions can be made, i.e. the assignment of the criminal procedures of different types can also be different, or the assignment of the criminal procedure may remain the same but the methods of implementation may be different. The authors, who relate the theoretical model of criminal procedure to its goals, interpret the adversiarial (accusatorial) process as a process, the principles of which define the essence of the civil society; they perceive the essence of the investigative (inquisitorial) process as a reflection of the values of an authoritarian state but not of the civil society.12 Different goals of criminal procedure, in their turn, may determine the different structure of criminal procedure. However, while talking about the possibly of different assignment of the real criminal procedures, once again it is necessary to consider the difference between the ideal, only theoretically existing model of criminal procedure and the positive criminal procedure.13 It is possible to talk about the pure adversiarial process or the pure investigative (inquisitorial) process only as about abstract theoretical ideas because the positive processes possess the elements which are attributed to both models, i.e. to the adversiarial and the investigative (inquisitorial) model. Most systems of criminal procedure do not conform to a purely adversiarial or inquisitorial model: they combine elements from each.14 Worthy of attention are the ideas of the authors who state that the positive process is somewhere between the due process and the crime control process.15

Usually it is acknowledged that the search for truth serves as the assignment of the investigative (inquisitorial) criminal procedure, whereas the criminal procedure, based on the adversiarial model, is assigned for settling arguments between parties. Being ruled by the theoretical classification of the models, the majority of Lithuanian authors acknowledge that the fundamentals of the investigative (or mixed) theoretical model prevail in the Lithuanian criminal procedure.16

12 Smirnov, A. V., supra note 11, p. 130.
13 Pradel, J., supra note 4, p. 118; Packer, H., supra note 5, p. 154.
15 Sanders, A., supra note 9, p. 1051–1054.
However, after the restoration of independence of Lithuania, the same tendencies which were formed and noticed in the democratic states in the middle of the twentieth century (constitutionalization, internalization-europeization of the ordinary law and differentiation of procedural forms\textsuperscript{17}) started to influence the evolution of the law of criminal procedure. The impact of the historically formed model of criminal procedure on the modern law of criminal procedure remains,\textsuperscript{18} in spite of the noticeable convergence of the systems of criminal procedure which are based on different models.\textsuperscript{19} However, at present the constitutional imperatives and the international imperatives of the human rights standards determine, essentially, the perception and interpretation of the assignment of the modern criminal procedure.

These tendencies inevitably produce a larger and larger impact on the creation, interpretation and application of the norms of the Lithuanian law of criminal procedure. The following conclusion is to be drawn: while laying the foundations of the national law of criminal procedure, the evolution of the criminal procedure of the modern lawful states must be modeled and perceived, and, despite of choosing the historically formed adversarial or inquisitorial model, such criteria of evaluation as the Constitution and the international (also the European Union) standards of the protection and defense of human rights, must be chosen.

2. The Constitution as the Spring which Models the Evolution of the Law of Criminal Procedure

As it was mentioned above, the criminal procedure in Lithuania as well as in other countries which keep to the continental law tradition is usually attributed to the historically formed theoretical model of investigative procedure. However, within recent centuries the almost indisputable position that the Constitution serves as the grounds for the legal system as well as for the law of criminal procedure is developed in the democratic states. The fundamentals are formed in the Constitution and in international treaties as well as in the European Union (hereinafter referred to as the EU) primary and secondary law, which consolidate the human rights and the mechanisms of their protection; being ruled by these principles, the legislator models the definite rules of criminal procedure. The strive for an open, just, and harmonious civil society and law-governed

\textsuperscript{17} Analogous tendencies of the private law and of the civil procedure are much more discussed, at least in Lithuania. These items do not serve as the object of scientific investigations in the doctrine of criminal procedure.


state established in the Preamble to the Constitution presupposes that every individual and society as a whole must be safe from unlawful conduct against them. The purpose of the state as a political organisation of the entire society is to ensure human rights and freedoms and to guarantee the public interest; therefore, while exercising its functions and acting in the interests of the entire society, the state has the obligation to efficiently ensure effective protection of human rights and freedoms as well as other values protected and defended by the Constitution of every individual and the whole society. Thus, the obligations of a state, which arise from the Constitution to ensure the security of each person and all society from criminal attempts implies not only the right and duty of the legislator to define criminal deeds and establish criminal liability for them by means of laws, but also the right and duty to regulate relations regarding detection and investigation of criminal deeds and consideration of criminal cases, i.e. the relations of criminal procedure.

However, the purpose of criminal procedure and its separate norms, prior to the preparation of the new code and its adoption in the doctrine of criminal procedure as well as in the judiciary practice, used to be analyzed by circumventing the analysis of the provisions of the Constitution as an integral act. The provision that the Constitution serves as the basis of the legal system is undisputable in legal literature; thus, other branches of law and other legal institutions must be analyzed as the development of the principles and ideas fixed in the Constitution. The Constitution cannot be interpreted following the ordinary law; it means that it is exactly the interpretation of the ordinary law that


must be substantiated by the provisions of the Constitution. However, some years ago it was possible to fully accept the opinion that the problems of separate branches of law used to be analyzed in isolation from the constitutional context.25 The abundant jurisprudence of the Constitutional Court of the Republic of Lithuania (hereinafter referred to as the Constitutional Court) of the recent years (in which much attention was drawn to the general model of the constitutional criminal procedure, to the system of the principles of criminal procedure, to the items of separate proceedings of criminal procedure and of the constitutionality of separate norms of criminal procedure26) as well as the latest scientific research into criminal procedure27 allow to state that an analysis of criminal procedure at least on the doctrinal level is impossible without an analysis of the context of the Constitution. The definite rulings passed by the Constitutional Court regarding the law of criminal procedure have at least the ternary impact: firstly, if a norm (or several norms) of criminal procedure is acknowledged as contradictory to the Constitution, it is not applied; secondly, if the norm which is argued about is not acknowledged as contradictory to the Constitution, the provisions stated in the motivation part of the ruling of the Constitutional Court are usually serviceable for interpretation of the norms of criminal procedure; and thirdly, the whole jurisprudence of the Constitutional Court is helpful for the scientific doctrine which investigates the law of criminal procedure.

3. Internationalization and Europeization of the Lithuanian Criminal Procedure

The beginning of the internationalization of the Lithuanian criminal procedure is to be related with the ratification of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as the Convention)28. But the striking changes of the Lithuanian criminal procedure related to the international standards of criminal procedure dealing with human rights and their restriction occurred later. They are to be related to the influence of the jurisprudence of the European Court of Human

Rights (hereinafter referred to as the ECHR). It has been changing from the sceptical attitude towards the possibility of direct application of the Convention in the spheres of criminal procedure and criminal law to its perceptible impact on lawmaking in the sphere of criminal procedure and changes in practical application of the CCP.

The Constitutional Court’s acknowledgement that the ECHR jurisprudence is the source of interpretation of the Lithuanian law, the started process of fixing the precedent in Lithuania and, finally, the LR Supreme Court’s practice to follow the ECHR jurisprudence while motivating decision-making in criminal cases, allow to state that this tendency intensifies.

While analyzing the impact of the ECHR jurisprudence on the Lithuanian law of criminal procedure and its application, it is possible to talk about the consequences of the cases lost v. Lithuania and about the impact of the whole ECHR case-law on the Lithuanian criminal procedure.

Soon after the ratification of the Convention, the lost case, in which an infringement of the Convention was stated, influenced both lawmaking and practice of application of the norms of criminal procedure. There, the alterations of the CCP related to the participation of the judge in the detention procedures were adopted after the lost cases; Jėčius’ case determined the cancellation of preventive detention as contradictory to Article 5 of the Convention; the decision made in the case of Birutis and others v. Lithuania served as an impulse to change the procedure of the interrogation of anonymous witnesses, which failed to secure the accused person’s right to question the witnesses. Later the ECHR used to state the infringements which were conditioned not by the law but by certain practice more often: the requirement of the right to trial within a reasonable time was once again stressed by the ECHR in the case of Šleževičius v. Lithuania; the reasonableness of the length of detention was analyzed in the case of Stašaitis v. Lithuania; the infringements of the presumption of innocence in were revealed in the case of But-

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30 The ruling of the Constitutional Court of the Republic of Lithuania of 8 May 2000.


32 *Jėčius v. Lithuania*, No. 34578/97.


34 *Šleževičius v. Lithuania*, No. 55479/00.

35 *Stašaitis v. Lithuania* (dec.), No. 47679/99.
kevičius v. Lithuania\textsuperscript{36}; the ECHR position regarding the application of the undercover agents was explained in the case of Ramanauskas v. Lithuania\textsuperscript{37}.

Not only the decisions made in the cases against Lithuania, but also the rest ECHR jurisprudence influence the improvement of the CCP and the practice of its application: recently the rules on the inquiry of children were changed following the criteria formed by the ECHR (Article 186 of CCP).

The legal system experienced significant changes in the year 2003, when Lithuania joined the EU. Europe’s values, as the integral factor of the EU, influence directly the evolution of the EU law because they get ‘juridizied’. The tendencies of the development of the national law of the EU Member States are not only the state’s own ‘concern’.\textsuperscript{38} The creation of the space for freedom, security and justice serves as one of the most important EU goals. However, while talking about the EU influence on the regulation of criminal justice, it must be noted that the scholars\textsuperscript{39} as well as the European Court of Justice\textsuperscript{40} keep to the standpoint that, as a rule, neither the criminal law, nor the law of criminal procedure are the subject of the EU general competence, but the law of the European Community can provide certain principles and limits of regulation. Though the demand for close cooperation in the course of criminal procedure really exists,\textsuperscript{41} the tendency of the europeization of criminal procedure used to be not so strong. At present, the influence of the EU law is noticed only in several spheres of criminal procedure\textsuperscript{42}, i.e. while securing cooperation in criminal cases; while fixing the minimal standards regarding the execution of orders freezing property or evidence; while ensuring mutual recognition of the decisions in criminal cases as well as while unifying the minimal rights of the persons participating in a criminal procedure.\textsuperscript{43} It must be added

\begin{thebibliography}{99}
\item \textsuperscript{36} Butkevičius v. Lithuania (dec.), No. 48297/99, ECHR 2002-II.
\item \textsuperscript{37} Ramanauskas v. Lithuania [GC], No. 74420/01.
\item \textsuperscript{38} Krehl, Ch. Reforms of the German criminal code - stock-taking and perspectives - also from a constitutional point of view. \textit{German Law Journal}. 2003, 4(5): 421–431.
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that recently the traditional criminal paradigm is being supplemented by the elements of the restorative justice model.\textsuperscript{44} Though the legal regulation of the victims’ status has not been causing significant problems in the Lithuanian criminal procedure law, the scientific doctrine also pays much attention to the victim of the criminal deed; however, the EU documents\textsuperscript{45} speeded up the real paces in the sphere of lawmaking, namely, the law on the compensation to crime victims of violent crimes was adopted.\textsuperscript{46}

On the other hand, it must be acknowledged that the mentioned decisions of the European Court of Justice and the Member States’ duty to secure the implementation of the provisions of the EU directives\textsuperscript{47} by the selected method as well as the Lisbon Treaty\textsuperscript{48} consolidate the europeization of the EU Member States’ (including Lithuania) criminal procedure.

Thus, in spite of quite mordant discussions of scientists and the complex lawmaking processes, the increased EU attention towards the criminal justice\textsuperscript{49} allows to state that the tendency of the europeization of the national criminal procedure will intensify. It can be forecasted that the spheres, in which the provisions regarding the national criminal procedure will be unified, are as follows: the minimal procedural safeguards granted to the participants of the procedure (the suspect, the victim and the witness) and the efficiency of the criminal procedure with regard to the protection of the EU interests.

In summary, it must be stated that the process of the europeization and internationalization of the criminal procedure in Lithuania has started not long ago and is awaiting the scientific assessment.\textsuperscript{50} But the Constitutional jurisprudence\textsuperscript{51} of the European coun-

\begin{thebibliography}{99}
\bibitem{47} Kaiafa-Gbandi, M., \textit{supra} note 39, p. 249.
\bibitem{48} Safferling, Ch. J., \textit{supra} note 39, p. 1392.
\bibitem{49} The Stockholm Programme - an open and secure Europe serving and protecting the citizens. Approved by the European Council on 10-11 December, 2009.
\bibitem{50} No scientific research into this issue was carried out in Lithuania. The doctrine of the Lithuanian criminal law contains the discussions about the impact of the EU law on the Lithuanian criminal law, see Abramavičius, A., Mickevičius, D.; Švedas, G. \textit{Europos Sąjungos teisės aktų įgyvendinimas Lietuvos baudžiamojo teisėje [Implementation of the EU Law in the Lithuanian Criminal Law]}. Vilnius: Teisinės informacijos centras, 2005. However, these issues are widely discussed in Europe. See: Rackow, P.; Miller, D. Literature on the internationalisation and europeanisation of criminal law. \textit{Criminal Law Forum}. 2008, 19: 265–275.
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tries as well as scientific research\textsuperscript{52} allow forecasting that the ‘single-sided’ transfer of the EU law into the Lithuanian law, may convert into an adjustment of the EU values to the constitutional values of the criminal procedure of Lithuania.

Conclusions

Though the impact of the historically formed model of criminal procedure on the national law of criminal procedure persists, it is strongly influenced by the common tendencies of the evolution of the Western law. After the restoration of independence of Lithuania, the tendencies, which were much earlier noticed in the democratic states, i.e. constitutialization, internationalization-europeization of the ordinary law and differentiation of the procedural forms, started to influence the evolution of the law of criminal procedure.

The decisions passed by the Constitutional Court in the cases dealing with the constitutionality of the laws of criminal procedure not only eliminate the provisions which are at variance with the Constitution, but also form the constitutional grounds for the law of criminal procedure and become an important source for the interpretation of the norms of criminal procedure.

The international standards started to influence the law of criminal procedure after Lithuania had joined the international treaties and had entered the European Union. Nonetheless, the increasing impact of the ECHR jurisprudence and EU activities in the sphere of the harmonization of criminal justice are to be evaluated as a certain measure of securing the human rights in criminal procedure and not as the footing of the common (unified) European criminal procedure.

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- Case C-176/03 Commission of the European Communities v. Council of the European Union [2005] ECR.


- Jėčius v. Lithuania, No. 34578/97.


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The ruling of the Constitutional Court of the Republic of Lithuania of 9 December 1998. On
Santrauka. Straipsnyje analizuojamos Lietuvos baudžiamojo proceso plėtros tendencijos per pastaruosius dvidešimt metų Lietuvoi atgavus nepriklausomybę.

Straipsnyje analizuojami pagrindiniai veiksmai, turintys įtakos baudžiamojo proceso srityje įstatymų leidybai, taip pat taikant baudžiamojo proceso normas. Tai Konstitucijos imperatyvai bei žmogaus teisės, įtvirtintos tarptautiniuose, taip pat ir Europos Sąjungos aktuose. Konstatuojama, kad anksčiau, keičiant arba pildant baudžiamojo proceso kodeksą, didžiausias dėmesys buvo skiriamas valstybės teisės tradicijai. Tuo tarpu šiuolaikinio baudžiamojo proceso teisės normas turi būti subordinuojamos Konstitucijoje įtvirtintiems principams bei tarptautiniuose susitarimuose susitarimuose numatytams žmogaus teisių apsaugos standartams.


Lietuvos Respublikos Konstitucinio Teismo sprendimai bylose dėl baudžiamojo proceso įstatymų konstitucinumo ne tik salina nuostatas, prieštaraujančias Konstitucijai, tačiau formuoja Baudžiamojo proceso teisės Konstitucinio pagrindus bei tampą svarbiu baudžiamojo proceso normų interpretavimo šaltiniu.

Lietuvai prisijungus prie tarptautinių sutarčių, įtvirtinant žmogaus teises, bei įstojo į Europos Sąjungą, baudžiamojo proceso teisė pradėjo veikti tarptautiniai standartai. Vis dėlto stiprėjanti EŽTT jurisprudencijos įtaka bei ES aktyvių veiksmai harmonizuojant baudžiamosios teisės srityt ir esąta vertinami kaip tam tikros žmogaus teisių baudžiamojame proceso užtikrinimo matas, o ne bendro (unifikuoto) Europos baudžiamojo proceso pamatas. Kita vertus, Lietuvoje dar trūksta sisteminio ir kritinio požiūrio į Europos Sąjungos teisės teisingumą nacionalinei baudžiamojo proceso teisei.

Reikšminiai žodžiai: baudžiamasis procesas, baudžiamojo proceso raudios tendencijos, baudžiamojo proceso konstitucionalizacija, baudžiamojo proceso internacionalizacija, baudžiamojo proceso europeizacija.
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