

JOURNAL
OF THE UNIVERSITY OF LATVIA
LATVIJAS UNIVERSITĀTES
ŽURNĀLS



Law

Juridiskā
zinātne

19

ISSN 1691-7677



LATVIJAS
UNIVERSITĀTE

JOURNAL
OF THE UNIVERSITY OF LATVIA
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The *Journal of the University of Latvia. Law* is an open access double blind peer-reviewed scientific journal.

The publishing of the *Journal of the University of Latvia. Law* is financed by the University of Latvia.

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The Journal of the University of Latvia. Law is included in the international databases Elton B. Stephens Company (EBSCO) Publishing and European Reference Index for the Humanities and Social Sciences (ERIH PLUS). Since 2022, the journal is indexed in Directory of Open Access Journals (DOAJ) and since 2023 in SCOPUS (the articles are indexed since 2021).

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ISSN 1691-7677 (Print)
ISSN 2592-9364 (Online)

Journal website and archive: <https://journal.lu.lv/jull>
<https://doi.org/10.22364/jull.19>

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<https://doi.org/10.22364/jull.19.01>

No Compensation for Non-pecuniary Damage to a Legal Person – Estonian Example

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The authors of this article explore whether legal persons should be entitled to compensation for non-pecuniary damage under Estonian law. Although current Estonian jurisprudence generally denies such claims, arguing that legal persons cannot experience pain or emotional suffering, the authors challenge this narrow interpretation. Through analysis of Estonian legal norms, comparative European jurisprudence, and the case law of the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU), the article argues that legal persons may still suffer reputational harm that warrants legal redress. The paper proposes a re-evaluation of Estonian tort law to allow compensation for non-pecuniary damage in specific situations, especially where reputational damage compromises a legal person’s ability to function effectively. Recognizing legal persons as holders of personal or quasi-personal rights could provide a more robust and equitable legal framework, in line with evolving European legal standards.

Keywords: legal persons, non-pecuniary damages, ECtHR, CJEU, compensation.

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Introduction

A legal person is a legal entity created by law. A legal person can be either a private or a public legal person.¹ At the end of 2023 more than three hundred thousand legal persons were operating in Estonia.² Legal persons are clearly not identifiable with natural persons. However, they may hold all civil rights and obligations in the same way as natural persons, except those that are attributable exclusively to humans: they carry out transactions, they can cause harm to third parties and they can also be victims of harm themselves.

It is not disputed in Estonian law that legal persons are entitled to claim compensation for pecuniary damage and to apply other remedies in appropriate circumstances. More problematic, however, is the question of whether a legal person could, under certain circumstances, also be entitled to claim non-pecuniary damage. Estonian case law has so far answered this question in the negative. In the opinion of the authors of the article, this position should at least be questioned, taking into account the case law of the European Court of Human Rights (ECtHR), Court of Justice of the European Union (CJEU) and trends in the legal systems of the EU Member States. Although legal persons cannot experience negative emotions, it does not necessarily follow that legal persons cannot suffer non-pecuniary damage as a result.

The problem raised is also of considerable practical importance and concerns the scope of legal protection of legal persons as a whole. Namely, in a situation where incorrect factual allegations or inappropriate value judgments have been published about a legal person which are damaging to its reputation, the legal person may be left with little (or no) substantive legal protection without the possibility to claim compensation for non-pecuniary damage. Even if one accepts that the damage to the reputation of a legal person is generally channelled into pecuniary loss for the legal person, a legal person claiming pecuniary loss usually faces very complex problems of proof, i.e., in most cases its claim is rejected. The other possible remedies (refutation of incorrect information and a claim for the prohibition of a continuing infringement) will generally not be able to re-establish the situation that existed before the damage was caused. A possible claim for compensation for non-pecuniary damage could provide a legal person with a real and substantive remedy for damage to its reputation.

The aim of this article is first to map the legal remedies of a legal person in case of damage to its reputation on the basis of Estonian law, then to analyse whether Estonian law allows a legal person to suffer non-pecuniary damage at all, and finally to assess by means of a comparative analysis whether and in which cases

¹ Tsiviilseadustiku üldosa seadus [General Part of Civil Code, GPCCA] (01.07.2002), § 24. Available: <https://www.riigiteataja.ee/en/eli/ee/523012025003/consolide/current> [last viewed 19.04.2025].

² E-äriregister [E-Business Register]. Available: <https://ariregister.rik.ee/est/statistics> [last viewed 19.04.2025].

the recognition of a claim for non-pecuniary damage by a legal person could be justified in Estonia.

1. Remedies of a legal person for damage to its reputation in Estonian tort law

There is no doubt in Estonian law that a legal person can claim compensation for material damage. In Estonia, general tort liability is based on a three-stage tort (objective element, wrongfulness and fault), of which the element of wrongfulness is key. The catalogue of unlawful acts/consequences is located in § 1045(1) of the Law of Obligations Act³ (LOA), whereas in the case of a legal person, subsections 5 to 8 are particularly relevant. It follows from these subsections that damage is unlawful if it is caused: by infringement of the victim's property or similar right or possession; by interference with the person's economic or professional activities; by conduct in breach of a legal obligation or by intentional conduct contrary to accepted principles of morality.

In the context of defamation in Estonia, a distinction is made between two situations: defamation is possible both by making an incorrect statement of fact and by making an inappropriate value judgement. In the case of an incorrect statement of fact, the protection of legal persons is at least guaranteed to a certain extent. Section 1047(4) of the LOA provides that "In the event of the publication of incorrect information, the injured party may claim from the person responsible for the publication of the information that the information be refuted or corrected at the expense of the person who published it, regardless of whether the publication of the information was unlawful". In order to benefit from this remedy, the inaccurate information does not have to be of a defamatory nature (i.e., no finding of unlawfulness is required)⁴ – thus, a legal person can also request the rectification of inaccurate information.⁵

In addition, in the case of continuous publication of an incorrect statement of fact, a legal person may also demand the cessation of such activity or refraining from threatening to do so on the basis of § 1055(1) of the LOA. Since the application of § 1055(1) of the LOA is subject to the duration of the unlawful damage, the legal person must also prove that the publication of incorrect information interfered with its economic or professional activities (§ 1047(1) of the LOA). In the case of the publication of incorrect data, a claim for compensation of pecuniary damage

³ Võlaõigusseadus [Law of Obligations Act] (01.07.2022). Available: <https://www.riigiteataja.ee/en/eli/ee/512112024001/consolide/current> [last viewed 19.04.2025].

⁴ Judgment of 15 April 2015 of the Civil Chamber of the Supreme Court of Estonia in case No. 3-2-1-24-15, p. 14. If a finding of unlawfulness were necessary, it would be possible on the basis of LOA § 1045(1) (6) and § 1047(1), as these provisions are also applicable to legal persons. It is simpler and clearer to say, however, that for a claim under § 1047(4) of the LOA it is sufficient that the factual allegations published are untrue. This can also be referred to as a so-called „lower-level unlawfulness“.

⁵ See judgment of 17 December 2015 of the Civil Chamber of the Supreme Court of Estonia in case No. 3-2-1-144-15, p. 11, where the court has noted that the legislator has not limited the circle of claimants under § 1047(4) of the LOA to natural persons or legal persons under private law, which is why a local government unit as a legal person under public law also has the right to file a claim under § 1047(4) of the LOA. However, in the past the Chamber of Administrative Law of the Supreme Court has found otherwise, see Court Order of 23 November 2010 in case No. 3-3-1-43-10, p. 33, where it has been found that since the City of Tallinn does not have any personal rights as referred to in § 1047(1) of the LOA, it cannot rely on § 1047(4) of the LOA to require the person responsible for the publication of the data to refute the information or to publish a correction at the expense of the publisher.

of the legal person is also possible – again on the assumption that the publication of the data constituted an interference with the economic or professional activity of the legal person, i.e., it is unlawful on the basis of § 1045(1)6 and § 1047(1) of the LOA. The law does not explicitly provide for a right to claim compensation for non-pecuniary damage from a legal person.

However, the protection of a legal person is considerably more problematic in a situation where inappropriate value judgments (opinions) are made about it. First of all, it is important to note here that § 1047(4) of the LOA, which allows for the possibility to request the refutation of incorrect facts, does not apply to value assessments. This is because an assessment, or opinion, cannot be intrinsically true or false.

For a claim for compensation of material damage and termination of the activity under § 1055(1) of the LOA, the damage to the reputation of the legal person must be unlawful. It is precisely because of this condition that a legal person is essentially deprived of legal protection if its reputation is damaged. This is, *inter alia*, due to the fact that § 1045(1)6 of the LOA, which prescribes the unlawfulness of interference with the economic or professional activities of a person, has not been regarded in Estonian law as an independent basis for unlawfulness, but has been applied in conjunction with § 1047(1) and § 1049 of the LOA.⁶

The unlawfulness of damaging the reputation of a legal person by an inappropriate value assessment cannot, according to the current approach, be derived from § 1045(1)4 of the LOA, which provides for the unlawfulness of the infringement of personal rights. This is due to the fact that neither in Estonian case law nor in the legal literature has the attribution of personal rights to legal persons been recognised so far.⁷

Theoretically, in case of damage to the reputation of a legal person, unlawfulness can also be derived from § 1045(1)7 and 8) of the LOA. The first of these provides for the unlawfulness of conduct in breach of a statutory obligation, the second for the unlawfulness of intentional conduct contrary to good morals. Estonian case law does not suggest that these grounds of unlawfulness are more than theoretical possibilities in this context. In the case of intentional harm against morality, the burden of proof for the victim is also quite high.

In the light of the foregoing, it must be concluded that, at this stage, the protection of a legal person against damage to its reputation caused by an inappropriate value assessment is only theoretical. This means that, in general, neither a claim for compensation for pecuniary damage nor the application of the remedy provided for in § 1055(1) of the LOA – not to mention compensation for non-pecuniary damage – is out of the question. From the objective of non-pecuniary damage (in particular) to alleviate a person's mental suffering and pain and the loss of enjoyment of life, it follows that a legal person may only claim the refutation of incorrect information in the event of a breach of good repute. In the case of an inappropriate value assessment, in the absence of pecuniary damage, the legal person has no adequate remedy, i.e., is deprived of an adequate defence.⁸

⁶ See for example judgment of 9 August 2023 of the Civil Chamber of the Supreme Court of Estonia in case No. 2-20-5869, p. 16.

⁷ *Tampuu, T.* Lepinguvälised võlasuhted [Extra-contractual legal relations]. Tallinn: Juura 2017, pp. 238–239.

⁸ See *Saare, K.* § 37, para. 3.2. In: *Tsiviilseadustiku üldosa seadus. Kommenteeritud väljaanne* [General Part of Civil Code Act. Commented edition], *Varul, P., et al.* (eds.). Tallinn: Juura, 2023, p. 171.

In order to ensure a minimum level of protection for the legal person in this case, i.e., to allow it to claim compensation for pecuniary damage and to stop the persistent misrepresentation, the current concept of tort in this context should be modified. One possibility would be to take the view that § 1045(1)6) of the LOA is an independent basis for unlawfulness – in this way, the interference with the economic and professional activities of a legal person by making inappropriate value judgments could also be considered unlawful.

Another alternative would be to recognise that a legal person could have either personal rights or rights similar to personal rights which protect its non-pecuniary interests. In this case, the illegality could be derived from § 1045(1)4) of the LOA (or applied by analogy).

Applying these alternatives would allow legal persons to benefit from a minimum level of legal protection.⁹ However, the key issue in securing legal protection (both in the case of incorrect facts and in the case of inappropriate value judgements) is compensation for non-pecuniary damage.

2. The legal person as a person entitled to compensation for non-pecuniary damage: *pro and contra*

The question of whether a legal person should be entitled to compensation for non-pecuniary damage is, in a sense, a fundamental one. As early as 1997, the Supreme Court of Estonia held that, since a legal person has no inherent moral character, it cannot claim compensation for non-pecuniary damage.¹⁰

On the one hand, it is obvious that a legal person as a legal abstraction cannot experience negative emotions. On the other hand, legal persons have been found to be members of society, just like human beings. They cannot experience negative emotions, but in the same way they cannot, for example, enter into contracts themselves, etc. On the basis of this logic, the negative emotions of the governing bodies of a legal person should also be transferable to the legal person.¹¹

Before considering whether compensation for non-pecuniary damage to a legal person is justified, the question should be answered as to whether a legal person can (in the context of Estonian law) suffer non-pecuniary damage at all. Namely, § 128(5) of the LOA provides that “Non-pecuniary damage includes, in particular, physical and mental pain and suffering of the injured party.” Understandably, only natural persons can experience physical and mental pain and suffering. However, the use of the wording “in particular” in the provision leaves room for the interpretation that non-pecuniary damage can also be something other than pain and suffering. Thus, in the case of a legal person, damage to reputation could be equivalent to pain and suffering. It is also perhaps not impossible to interpret the words “pain and suffering” in the provision as meaning, in the case of a legal person, the pain and suffering of the members of its management body or members.

⁹ Minimal because, for example, a claim for compensation for pecuniary damage would still be only theoretical if it were granted. This is because, in most cases, a legal person will not be able to prove that it suffered pecuniary damage as a result of the inappropriate valuation (causal link problem).

¹⁰ Judgment of 27 March 1997 of the Civil Chamber of the Supreme Court of Estonia in civil case No. 3-2-1-35-97.

¹¹ *Kozioł, H.* Basic Questions of Tort Law from a Germanic Perspective. Jan Sramek Verlag, 2012, p. 118.

According to § 25 of the Constitution of the Republic of Estonia (Constitution)¹², everyone has the right to compensation for moral and material damage unlawfully caused to him or her by any person. Since the Constitution uses the expression “moral damage” and the legal person itself cannot suffer physical or mental pain and suffering, the commentaries on the Constitution have held that the fundamental right to compensation for “moral” damage provided for in § 25 of the Constitution does not apply to legal persons under § 9(2) of the Constitution.¹³ It is therefore not a fundamental right whose protection must be guaranteed by law.

However, a law may also provide for the protection of rights and remedies not provided for in the Constitution. Pursuant to § 24(1) of the GPCCA, which entered into force in 1994, a legal person had the right to demand the cessation of defamatory statements, the refutation of the defamatory statements if the defamatory person did not prove them to be true, and compensation for the pecuniary damage caused by the defamatory statements. The new version of the GPCCA, which entered into force in 2002, does not contain a similar provision, but limits the legal capacity of a legal person by excluding the rights of a legal person that are only vested in human beings (§ 26(1) GPCCA).

Another obstacle to compensating a legal person for non-pecuniary damage is that the damage must have been caused unlawfully. Neither § 1045(1)6 nor 8) of the LOA allows for compensation for non-pecuniary damage. In the case of the violation a duty arising from law (§ 1045(1)7) LOA), it is theoretically possible that the purpose of the corresponding rule of protection is, inter alia, to compensate the injured party for non-pecuniary damage. However, this is only a hypothetical variant, as in practice a claim for non-pecuniary damage by a legal person has never been recognised on the basis of this construction.

The Law of Obligations Act regulates cases of compensation for non-pecuniary damage exhaustively (§ 134). The text of the § 134(2) of the LOA is following: “In the event of an obligation to compensate for damage caused by depriving a person of his or her liberty, causing bodily injury to a person, damage to his or her health or other violation of personal rights, including defamation of a person, a reasonable sum of money must be paid to the injured person as compensation for non-pecuniary damage”. It can be concluded from the foregoing, however, that in order to compensate a legal person for non-pecuniary damage, it should be recognised that a legal person can be the owner of personal rights or at least of certain non-pecuniary rights, which are protected by analogy on the basis of § 1045(1)4) of the LOA. Without this, it is also difficult to substantiate a claim for non-pecuniary damage on the part of a legal person, since such a claim presupposes that the damage was unlawfully caused.

It can, therefore, be concluded that a step leading to compensation for non-pecuniary damage to a legal person (according to the Estonian tort law in force) presupposes a change in the concept of unlawfulness – to whom personal rights can belong and how they can be qualified.¹⁴

¹² Eesti Vabariigi Põhiseadus [The Constitution of the Republic of Estonia] (03.07.1992). Available: <https://www.riigiteataja.ee/en/eli/ee/530122020003/consolide/current> [last viewed 19.04.2025].

¹³ *Jäätma, J., Pilving, I.* Eesti Vabariigi põhiseadus. Kommenteeritud väljaanne [The Constitution of the Republic of Estonia. Commented Edition], 2020. Comments to § 25, pr. 34. Available: <https://pohiseadus.ee/sisu/3496> [last viewed 19.04.2025].

¹⁴ In countries where there is no catalogue of unlawful activities similar to the Estonian LOA, it is therefore easier to base compensation for non-pecuniary damage to legal persons.

3. Justification for (non-) compensation of non-pecuniary damage to a legal person

3.1. Estonian case law

As mentioned above, the Supreme Court of Estonia held already in 1997 that non-pecuniary damage is not compensable to a legal person¹⁵, and has maintained this position to this day. In the latest relevant decision, the Supreme Court stated that a legal person cannot, by its very nature, be subject to claims for compensation for non-pecuniary damage caused by defamation of its honour.¹⁶

Previously, the Supreme Court has held (rather peculiarly) that some of the non-pecuniary damage that a legal person may suffer is compensable in Estonia as pecuniary damage (e.g., damage to the company's reputation and hindrance to business).¹⁷

However, the case law of lower courts contains examples where the court has not unequivocally ruled out the possibility of compensation for non-pecuniary damage to a legal person. For example, the Tallinn Circuit Court, in relation to a claim for non-pecuniary damage brought by a political party, has stated that a claim for non-pecuniary damage by a legal person is not impossible, but in this case the plaintiff has not put forward any compelling arguments justifying an award of compensation.¹⁸

It is worth noting that Estonian law does not explicitly exclude the occurrence of or compensation for non-pecuniary damage to a legal person. In one case the law even provides for it. Namely, § 26 of the Trade Unions Act¹⁹ provides that "A trade union whose rights have been infringed has the right to demand the cessation of the infringement, the performance of its obligations and compensation for material and non-pecuniary damage caused". Trade unions in Estonia take the form of non-profit-making associations and are legal persons governed by private law. There is practically no case law in Estonia in the application of the above provision: only in one case did a trade union claim compensation for non-pecuniary damage under this provision, but the court dismissed its claim on the ground that the defendant's fault in causing the non-pecuniary damage to the trade union had not been proved.²⁰

Among the Estonian authors, T. Tampuu admits that there is a dispute as to whether legal persons should be compensated for non-pecuniary damage, but does not take a position on this issue, referring to the case law of the Supreme Court, according to which a legal person is only compensated for pecuniary damage.²¹

¹⁵ Judgment of 27 March 1997 of the Civil Chamber of the Supreme Court of Estonia in civil case No. 3-2-1-35-97.

¹⁶ Judgment of 9 August 2023 of the Civil Chamber of the Supreme Court of Estonia in civil case No. 2-20-5869, p. 14.

¹⁷ Judgment of 6 March 2015 of the Chamber of Administrative Law of the Supreme Court of Estonia No. 3-3-1-78-14, p. 23.

¹⁸ Decision of 18 December 2017 of the Tallinn District Court in civil case No. 2-15-13629, p. 7. Basically the same has been found by the Tallinn District Court in its decision of 23 February 2018 in civil case No. 2-16-14326.

¹⁹ Ametiühingute seadus [Trade Unions Act] (2000). Available: <https://www.riigiteataja.ee/en/eli/ee/519012023006/consolide/current> [last viewed 19.04.2025].

²⁰ Decision of 22 December 2008 of the Viru County Court in civil case No. 2-07-40266.

²¹ See *Tampuu, T.* Lepinguvälised võlasuhted, p. 360.

3.2. Compensation for non-pecuniary damage in the case law of the European Court of Human Rights and the Court of Justice of the European Union

The case law of the European Court of Human Rights (ECtHR) on the compensation of non-pecuniary damage to legal persons could be one of the arguments for reconsidering the approach prevailing in Estonia so far or at least for a discussion on this issue. Although the ECtHR does not interpret national law or assess its compatibility with the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)²², and a state party to the ECHR is under no direct obligation to amend its laws in accordance with ECtHR case law, states have supplemented their laws or courts changed their case law to take account of it. Since the ECHR has been seen as a living instrument, the interpretation of which must be adapted to the needs and circumstances of the time in which the dispute is being resolved, the corresponding case-law has increasingly extended to legal persons the rules of protection which are presumed to apply only to natural persons.

As a result of a teleological interpretation the scope of the ECHR today covers the activities of companies to an extent that was not discussed or foreseen when the convention was adopted. Thus, for example, the ECtHR has held that the protection of freedom of expression under Article 10(1) extends to legal persons²³, that a legal person's business premises are protected as a "home" under Article 8(1), irrespective of whether the privacy of individuals was also violated in the course of an investigation conducted on the premises²⁴, and that compensation for non-pecuniary damage suffered by a legal person as a result of "survivors" is not excluded²⁵.

The right of a legal person to obtain compensation for non-pecuniary damage caused has been recognised by the ECtHR in its judgment of 19 December 1994 in the case *Vereinigung Demokratischer Soldaten Österreichs and Gubi v. Austria* (concerning a violation of Article 10 of the ECHR).²⁶ A more detailed explanation of the right of a legal person to compensation for non-pecuniary damage has been given by the ECtHR in *Comingersoll S.A. v. Portugal* (2000). In that case, the Portuguese Government argued that the purpose of compensation for non-pecuniary damage was "to compensate for anxiety, mental stress resulting from the anticipation of

²² Convention for the Protection of Human Rights and Fundamental Freedoms. Riigi Teataja [State Journal] II 2010, 14, 54.

²³ Judgments of the European Court of Human Rights of 22 May 1999 in case *Autronic AG v. Switzerland* No. 12726/87, para. 61 and of 5 February 2003 in case *Demuth v. Switzerland* No. 38743/97. Available: <https://hudoc.echr.coe.int/eng?i=001-57630> and <https://hudoc.echr.coe.int/eng?i=001-60724> [last viewed 19.04.2025].

²⁴ The ECtHR referred in its judgment to the fact that the term "domicile" (*domicile* in the French version of Article 8) has a broader meaning than the term "home" and may extend, for example, to a professional person's office. See judgment of the European Court of Human Rights of 16 April 2002 in *Société Colas Est and others v. France*, case No. 37971/97, para. 40. Available: <https://hudoc.echr.coe.int/eng?i=001-60431> [last viewed 19.04.2025]. See also case analyses in *Emberland, M.* Protection Against Unwarranted Searches and Seizures of Corporate Premises Under Article 8 of the European Convention Corporate Premises Under Article 8 of the European Convention on Human Rights: The on Human Rights: The Colas Est SA v. France Approach. *Michigan Journal of International Law*, 2003, p. 25. Available: https://repository.law.umich.edu/cgi/viewcontent.cgi?params=/context/mjil/article/1249/&path_info= [last viewed 19.04.2025].

²⁵ See more in *Pavelek, O., Zajickova, D.* Compensation for non-material damage caused to legal entities in the decision-making practice of the CJEU and the ECHR. *Juridical Tribune*, 13(3), 2023, pp. 331–345.

²⁶ Judgement of the European Court of Human Rights of 19 December 1994. *Vereinigung Demokratischer Soldaten Österreichs and Gubi v. Austria*, case No. 15153/89. Available: <https://hudoc.echr.coe.int/en#%22itemid%22:%22001-45608%22>] [last viewed 19.04.2025].

the outcome of a case and uncertainty” and that such feelings are peculiar only to natural persons.²⁷ The ECtHR, however, exercised the discretion conferred on it by Article 41 of the ECHR, according to which the court may, where appropriate, award the injured party just satisfaction for the breach, even if national law does not allow compensation for non-pecuniary damage to a legal person, if the court finds that there has been a breach of the Convention or its Protocols and the law of the Contracting Party allows only partial compensation.²⁸

In particular, the ECtHR referred to the fact that Article 41 does not limit the damage to be compensated only to material damage, nor does it limit the circle of persons entitled to claim compensation.²⁹ The ECtHR found that in calculating non-pecuniary damage, account should be taken of the company’s reputation, uncertainty in decision-planning, disruption in the management of the company and lastly, albeit to a lesser degree, the anxiety and inconvenience caused to the members of the management team.³⁰

In the judgment, Judge Rozakis dissented and held that the ECtHR could have accepted without reservation that a company may suffer non-pecuniary damage not because its directors or shareholders feel anxiety or insecurity, but because an act or omission by the State may damage the reputation of the legal person. In particular, the ECtHR has recognised the protection of the reputation of a legal person under Articles 8 (right to respect for private and family life) and 10 (freedom of expression) of the ECHR.³¹ The reference to the misdeeds of natural persons who are members of the organs of a legal person was also used by the ECtHR in case *Affaire SCI Le Château du Francport v. France* of 13 June 2024, in which it upheld a claim for compensation for non-pecuniary damage.³² In conclusion, the ECtHR has held that the right of a legal person to financial compensation for non-pecuniary damage cannot be

²⁷ Judgment of 06 April 2000 of the ECtHR in case *Comingersoll S. A. v. Portugal*, para. 28. Available: <https://hudoc.echr.coe.int/eng?i=001-58562> [last viewed 19.04.2025].

²⁸ See references in ECtHR judgment in case *Comingersoll S.A. v. Portugal* to previous judgments where a legal person has been awarded compensation for non-pecuniary damage (para. 29). Judgement of the European Court of Human Rights of 6 April 2000. *Comingersoll S.A. v. Portugal*, case No. 35382/97. Available: <https://hudoc.echr.coe.int/fre#%22itemid%22:%22002-6893%22>] [last viewed 19.04.2025].

²⁹ For further details on the interpretation of Article 41 see *Altwickler-Hamori, S., Altwickler, T., Peters, A. Measuring Violations of Human Rights: An Empirical Analysis of Awards in Respect of Non-Pecuniary Damage Under the European Convention on Human Rights. Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (ZaöRV)*, 76, 2016, pp. 4–6.

³⁰ The ECtHR also referred explicitly to the considerable inconvenience and long-term insecurity of the company’s directors and shareholders in the day-to-day management of the company’s activities during the legal proceedings which lasted almost 8 years. See judgment of ECtHR in case *Comingersoll S.A. v. Portugal*, No. 35382/97, paras. 35 and 36.

³¹ See judgements of the European Court of Human Rights 02 May 2016 of the ECtHR in case *Magyar Tartalomszolgáltatók Egyesülete v. Hungary*, No. 22947/13, para. 67. Available: <https://hudoc.echr.coe.int/eng?i=001-160314> and of 16 May 2016 in case *Ärzttekammer für Wien v. Austria* in case No. 8895/10, para. 62. Available: <https://hudoc.echr.coe.int/eng?i=001-160623> [last viewed 19.04.2025]. Critically, on ensuring that companies enjoy equal protection with individuals, see more details in *Steininger, S., Von Bernstorff, J. Who Turned Multinational Corporations into Bearers of Human Rights? On the Creation of Corporate ‘Human’ Rights in International Law (25 September 2018). Max Planck Institute for Comparative Public Law & International Law (MPIL) Research Paper No. 2018-25. Available: https://ssrn.com/abstract=3254823 [last viewed 19.04.2025].*

³² Judgement of 13 June 2024 of the European Court of Human Rights in case *Affaire SCI Le Château du Francport v. France*, No. 3269/18, para. 41: “In the present case, the situation at issue has necessarily caused the applicant and its directors, who are natural persons, considerable inconvenience, if only in the management of its business and with regard to its commercial reputation, which justifies the award of compensation in that respect.”

automatically excluded, but must be determined in the light of the circumstances of each individual case.

The Court of Justice of the European Union (CJEU) has also recognised compensation for non-pecuniary damage to a legal person, referring to the relevant ECtHR case law³³ and Article 268 TFEU³⁴ in conjunction with the second paragraph of Article 340 TFEU. It has also recognised the individual rights of the legal person, which, in the Court's view, may be infringed, *inter alia*, by the publication on the Internet of inaccurate information and the failure to remove comments about the legal person. This gives rise to a right to compensation for all damage (including non-pecuniary damage).³⁵

The CJEU has not defined non-pecuniary damage, but it has found, based on the case law of the ECtHR, that it is damage in which it is possible to distinguish between objective and subjective elements and which certainly includes damage that may be caused to the reputation or image of a legal person.³⁶ The CJEU has defined reputation as an asset the market value of which cannot be reliably ascertained prior to a transaction (e.g., transfer, merger) involving the company.³⁷ In particular, a company's reputation can be damaged by the publication of inaccurate information or information that negatively characterises the company³⁸, which in turn can lead to the loss of financially difficult opportunities.³⁹ Like the ECtHR, the CJEU has recognised the possibility that reputational damage caused to a company may also

³³ In particular, the EC has relied on the ECtHR judgment in *Comingersoll S.A. v. Portugal*.

³⁴ Consolidated version of the Treaty on the Functioning of the European Union. Available: <https://eur-lex.europa.eu/legal-content/LT/ALL/?uri=CELEX%3A12012E%2FTXT> [last viewed 19.04.2025].

³⁵ See judgment of 17 October 2017 of the CJEU in case *Bolagsupplysningen OÜ, Ingrid Ilsjan v. Svensk Handel*, No. AB C194/16, para. 44, where the main dispute concerned the determination of the place where the damage occurred. Available: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:62016CJ0194> [last viewed 19.04.2025].

³⁶ See judgment of the European General Court of 13 December 2018 in case *Post Bank Iran v. Council of the European Union*, No. T559/15, where reference is made to the case *Comingersoll S.A. v. Portugal*. Available: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62015TJ0559> [last viewed 19.04.2025]. See also judgment of the Court of First Instance (First Chamber) of 28 January 1999 in case *Bretagne Angleterre Irlande (BAI) v. Commission of the European Communities*, No. T-230/95, para. 39. Available: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:61995TJ0230> [last viewed 19.04.2025].

³⁷ See judgment of the European General Court 13 September 2010 in joined cases *Hellenic Republic and others v. European Commission*, No. T-415/05, T-416/05 and T-423/05, para. 297. Available: <https://eur-lex.europa.eu/legal-content/ET/TXT/?uri=CELEX:62005TJ0415> [last viewed 12.03.2025].

³⁸ Judgment of European General Court of 13 December 2018 in case *Iran Insurance Company v. Council of the European Union*, No. T558/15, para. 129. Available: <https://eur-lex.europa.eu/legal-content/GA/TXT/?uri=CELEX:62015TJ0558> [last viewed 19.04.2025]. The General Court also refers to previous judgments such as judgment of the Court of First Instance of 28 January 1999 in case *BAI v. Commission of the European Communities*, No. T-230/95, para. 37 and Judgments of the Court of First Instance of 15 October 2008 in joint cases *Camar v. Commission*, No. T457/04 and T223/05, paras. 53 and 69 and of 25 November 2014 in case *Safa Nicu Sepahan v. Council*, No. T384/11, paras. 80–85.

³⁹ E.g., in principle, there may be a non-pecuniary damage if a legal person loses the possibility to award contracts due to a loss of reputation in the eyes of the public authorities. However, such damage must be proven, for example, by the submission of tenders in a procurement procedure in which the contracting authorities would have been the public authorities referred to. See more in Judgment of General Court of 14 December 2018 in case *East West Consulting SPRL v. European Commission*, No. T-298/16, paras. 177 and 180. Available: <https://eur-lex.europa.eu/legal-content/ET/TXT/?uri=CELEX:62016TJ0298> [last viewed 19.04.2025].

affect the reputation of a director or shareholder and, depending on the circumstances, may be compensable as non-pecuniary damage.⁴⁰

Although non-pecuniary damage cannot be directly quantified in monetary terms, in order to obtain compensation, the claimant must at least prove that there is a causal link between the unlawful conduct and the damage suffered.⁴¹ However, in order to determine the appropriate level of compensation for non-pecuniary damage, it is possible to rely not only on fairness, but also on the cost of the investments made to create and maintain the image and reputation of the company.⁴²

Compensation for non-pecuniary damage may be excluded if, in the circumstances, some other measure is sufficient to remedy the infringement. For example, in a situation where reputational damage has been caused by the inclusion of a legal person on a list of internationally restrictive measures applicable to companies⁴³, the removal of the company from the list may be a sufficient remedy. It is therefore necessary to take into account the circumstances of each individual dispute and, consequently, to assess whether restoration of the status quo or financial compensation is an appropriate remedy.

In conclusion, both the ECtHR and the CJEU have recognised the right of a legal person to financial compensation for non-pecuniary damage caused to it. In particular, it is justified where the image or reputation of the legal person is damaged, long-term uncertainty is created, “survival” is caused and where the damage to the reputation reduces the commercial opportunities of the legal person. Damage to the reputation of the company may also affect the reputation of the directors or shareholders and cause them non-pecuniary damage.

3.3. Compensation for non-pecuniary damage in the European legal systems⁴⁴

There is nothing exceptional about compensation for non-pecuniary damage to a legal person – in several European countries a legal person can be the recipient of both pecuniary and non-pecuniary benefits, and the right of a legal person to claim compensation for non-pecuniary damage is recognised accordingly.⁴⁵ As C. von Bar pointed out more than 20 years ago, all European legal systems share the principle that the reputation of a legal person (at least a private legal person) can be damaged to

⁴⁰ See *BAI v. Commission of the European Communities*, No. T-230/95, para. 37 and Judgement of the Court of First Instance of 15 October 2008 *Camar v. Commission*, joint cases No. T457/04 and T223/05, para. 54. Available: https://eur-lex.europa.eu/legal-content/ET/TXT/HTML/?uri=CELEX:62004TJ0457_INF [last viewed 19.04.2025].

⁴¹ For example, the Court has held that non-pecuniary damage is not compensable because the claimant has not provided any objective evidence of the unfair treatment that led to the non-pecuniary damage. See *BAI v. Commission of the European Communities*, No. T-230/95, para. 39.

⁴² See judgment of General Court of 13 January 2017 in case *Idromacchine Srl and others v. European Commission*, No. T-88/09, para. 74. Available: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62009TO0088> [last viewed 19.04.2025].

⁴³ See judgment of General Court of 13 December 2018 in case *Iran Insurance Company v. Council of the European Union*, No. T558/15. Available: <https://eur-lex.europa.eu/legal-content/GA/TXT/?uri=CELEX:62015TJ0558> [last viewed 19.04.2025]. The applicant, an Iranian insurance company, was included in the list of persons and entities subject to restrictive measures set out in the Annex to Council Regulation (EC) No. 423/2007 of 19 April 2007 imposing restrictive measures against the Republic of Iran.

⁴⁴ We would like to thank our acclaimed colleagues prof. E. Dacoronia, A. Pereira and T. Gardner Graziano for their comments and guidance into national laws.

⁴⁵ See more in *Winiger, B., Koziol, H., Koch, B. A., Zimmermann, R.* (eds.). *Digest of European Tort law. Volume 2: Essential Cases on Damage*. Berlin, DeGruyter, 2011, pp. 1005–1034.

the same extent as the honour of a natural person can be defamed⁴⁶, and the capacity of a legal person to suffer non-pecuniary damage and the right to be compensated for the damage caused by it are widely recognised.⁴⁷ Compensation for non-pecuniary damage to a legal person implies recognition of its personal rights.⁴⁸ However, damage to reputation, as a violation of the personal rights of legal persons, is only regulated in a few European countries. There are even fewer countries where the right of a legal person to claim compensation for non-pecuniary damage in the event of a breach of a personal right is explicitly provided for by law.

Insofar as the Estonian Supreme Court has relied primarily on the wording of the law in rejecting a claim for compensation for non-pecuniary damage to a legal person, it is appropriate to give examples of how courts have interpreted the provisions regulating the protection of the personal rights of legal persons in other countries, including the model countries of Estonian law of obligations.

For example, according to § 1330(1) of the Austrian General Civil Code (Allgemeines Bürgerliches Gesetzbuch, ABGB), everyone has the right to claim compensation for actual damage or loss of earnings in the event of defamation. The Austrian Supreme Court has clarified that legal persons have a passive capacity to be offended and that, if the provider of the information at least had to have known of the inaccuracy of the information and this resulted in damage to reputation, the injured party may claim under both § 1330(1) and (2) of the ABGB for the refutation of the inaccurate information and/or compensation for the damage caused, but only for pecuniary damage.⁴⁹

German Civil Code (Bürgerliches Gesetzbuch, BGB) § 824 provides for the protection of persons against damage caused by the transmission of incorrect data. The purpose of the provision is to protect the pecuniary interests of persons and companies, such as economic value (Vermögensinteressen: wirtschaftliche Wertschätzung von Personen und Unternehmen), so that the communication of incorrect facts or inappropriate value assessments is only considered defamatory if the creditworthiness or commercial reputation of the legal person is adversely affected as a result. However, only the pecuniary damage is compensable.⁵⁰ Compensation for non-pecuniary damage cannot be claimed on the grounds that the interests listed in § 253(2) BGB⁵¹, such as body, health, freedom or the right to sexual self-determination, can only be held by natural persons.

⁴⁶ *Von Bar, C.* The Common European Law of Torts. Volume Two. Oxford: Oxford University Press, 2000, p. 131.

⁴⁷ *Von Bar, C.* Principles of European Law. Study Group on a European Civil Code. Non-Contractual Liability Arising out of Damage Caused to Another. Oxford, Oxford University Press, 2009, p. 336.

⁴⁸ *Ibid.*, p. 343.

⁴⁹ See OGH 26.06.2014 6 Ob 45/14g.

⁵⁰ The application of this provision is limited by Article 5 of the Constitution and Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which guarantee freedom of expression. See *Wagner, G.* Münchener Kommentar zum BGB, 9. Auflage [Munich Commentary on the German Civil Code (BGB), 9th edition], 2024, § 824, Rn. 3-4.

⁵¹ Section 253(2) of the German Civil Code lists the following as protected interests: the right to bodily, health, freedom or sexual self-determination. At the same time, however, German case law has also held that from the prevailing opinion that monetary compensation in favour of a legal entity in cases of infringement of general right of personality is out of the question, the exception is justified if there are no other ways of compensation. See OLG Frankfurt a.M., Urteil vom 18.03.2013 – 1 U 215/11. Available: <https://openjur.de/u/620477.html> [last viewed 19.04.2025].

Greek legal theory and practice⁵² recognises the personal rights of a legal entity (§§ 58, 59, 298, 932 Civil Code) and the possibility that a legal person may suffer non-pecuniary damage if the personal rights of a legal person, such as reputation, commercial reliability or good name, are infringed.⁵³ However, contrary to Austrian and German law, Greek case law has held that non-pecuniary damage to a legal person is also compensable if it is proved that the breach resulted in damage to reputation or economic prospects, whereas damage to non-pecuniary interests may also be proved by the occurrence of material damage (e.g., a substantial decrease in the value of shares).⁵⁴

Swiss Civil Code⁵⁵ provides that if someone's good name is damaged, they may bring an action to establish their rights (Article 29(1)). Article 49, para. 1 of the Swiss Code of Obligations⁵⁶ consists of general clause that any person whose personality rights are unlawfully infringed is entitled to a sum of money by way of satisfaction, provided this is justified by the seriousness of the infringement and no other amends have been made. An infringement is unlawful, if it is not justified by the consent of the injured party, by an overriding private or public interest or by law. According to established case law⁵⁷, the protection of personality rights under Article 29 of the Swiss Civil Code applies to natural persons, but also legal persons, insofar as it is not based on characteristics that by their nature only belong to natural persons. The case law has counted among the protected interests for example the honour, privacy, secrecy, right to social reputation and free economic development of a legal person.⁵⁸ The right for compensation for non-pecuniary loss depends from the objective seriousness and subjective perception of suffering.⁵⁹ However, slight damage to a person's professional, economic or social reputation does not justify compensation.⁶⁰

⁵² *Dacornia, E.* in *Koziol, H., Steininger, B. C.* (eds.). *European Tort Law 2010* (2011), pp. 247–248, Nos. 2–4.

⁵³ Translation of Art. 932 of the Greek Civil Code: Compensation for moral harm. In the case of a tort the court may, independently of damages for pecuniary damage, award a reasonable, according to its reasoning, sum of monetary compensation for moral harm. This applies especially to a person who has suffered harm to health, honour or chastity or was deprived of his liberty. In the case of death, this monetary compensation may be awarded to the family of the victim for pain and suffering. See *Dacornia, E.* *Tort Law in Greece*, 2nd ed., Wolters Kluwer, 2023, Part I, Ch. 2 para. 4, No. 97 and in Part VI, Ch. 4 para. 2IX, lk 311, 312; *Dacornia, E.* in *Koziol, H., Steininger, B. C.* (eds.). *European Tort Law 2005* (2006), pp. 321–323. ΑΣΤΙΚΟΣ ΚΩΔΙΚΑΣ [Greek Civil Code] (1946). Available: <http://5dim-n-irakl.att.sch.gr/documents/AstikosKodikas.pdf> [last viewed 19.04.2025].

⁵⁴ For example, in case No. AP 356/2010, a bank employee communicated to the press defamatory rumours that bank executives were involved in stock market manipulation. The court found that the transmission of the allegations had caused non-pecuniary damage to the bank, for which the court ordered an award of €35 000. The damage was proved by the pecuniary loss, which was the fall in the value of the bank's shares. See *Dacornia, E.* in *Koziol, H., Steininger, B. C.* (eds.). *European Tort Law 2010* (2011), pp. 247–248.

⁵⁵ Swiss Civil Code (1907). Available: https://www.fedlex.admin.ch/eli/cc/24/233_245_233/en [last viewed 19.04.2025].

⁵⁶ Swiss Civil Code. Part Five: Code of Obligations (1911). Available: https://www.fedlex.admin.ch/eli/cc/27/317_321_377/en [last viewed 19.04.2025]. The court may order that satisfaction be provided in another manner instead of or in addition to monetary compensation.

⁵⁷ See Zurich, Commercial Court, 13.06.2023, HG200241.

⁵⁸ See Swiss Federal Court, 17.02.2015, 6B_916/2014.

⁵⁹ For example, non-pecuniary damages were claimed for damage caused by the publication of an opinion in a newspaper article. The article claimed that the money used by the company to carry out the project had come from dubious sources. See Tribunal Fédéral, 6B_539/2016, 01.11.2017.

⁶⁰ Swiss Federal Court, 28.04.2022, 6B_1272/2021, p. 1.1: “The right of a legal person to compensation for non-pecuniary damage presupposes a much more serious breach than for natural persons.”

The general clause on the protection of personality interests in Article 484 of the Portuguese Civil Code⁶¹ provides that whoever affirms or disseminates a fact which is able to harm the credit or good name of any person, private individual or legal person, is liable for the damage caused.⁶² According to the legal literature, the “good name” seems to refer to the general reputation of the person within the social circles where he or she lives and where he or she performs his or her professional duties. The term “credit” seems to refer to a special kind of reputation, which is business-related.⁶³ For the determination of compensation, regard must be had to non-pecuniary damage which, due to its seriousness, deserves protection of the law which leaves to the courts the right to decide what damage is serious and deserves protection (Article 496 of Portuguese Civil Code).⁶⁴

According to the Polish Civil Code,⁶⁵ the provisions regulating the protection of the personal interests of natural persons also extend to legal persons (Articles 24 and 43). Although the law does not stipulate that such application also implies the right of legal persons to compensation for non-pecuniary damage, the Polish Supreme Court has held that a legal person is entitled to claim compensation for non-pecuniary damage caused by the infringement of personal rights in the same way as a natural person, irrespective of whether pecuniary damage is compensable. One of the arguments put forward was the fact that the benefits to be protected are not exhaustively listed in the law.⁶⁶ The Polish Supreme Court held that what is important is not the feelings or survival of natural persons who are members of the management bodies of the legal person, but whether the legal person as the subject of the rights has suffered damage to “non-material values that enable a legal person to function in accordance with its scope of activities”.⁶⁷

In French law, the right of a legal person to compensation for pecuniary damage caused is derived from Article 1240 of the Civil Code⁶⁸, which provides for an obligation to compensate for damage wrongfully caused where the person who caused the damage is in fault of causing the damage or is liable for causing the damage in accordance with the law. Thus, case law has held that also a legal person may suffer non-pecuniary damage which justifies granting compensation for non-pecuniary

⁶¹ Código Civil [Portuguese Civil Code] (1966). Available: <https://diariodarepublica.pt/dr/legislacao-consolidada/decreto-lei/1966-34509075> [last viewed 19.04.2025].

⁶² Portuguese Civil Code, Art. 484:1: “1. Whoever, with intent or mere guilt, unlawfully violates the right of another or any legal provision intended to protect the interests of another shall be obliged to compensate the injured party for the damages resulting from the violation. 2. The obligation to compensate exists regardless of fault only in the cases specified in the law.”

⁶³ See reference to *Albuquerque Matos, F. M. Responsabilidade civil por ofensa ao crédito ou ao bom nome* [Civil liability for damage to credit or reputation]. Coimbra, 2007, pp. 115 and 116 in *Oliveira, N., Pereira, A. Tort Law in Portugal*, Kluwer, 2020, pp. 72–75.

⁶⁴ See *Dias Pereira, A. G. II. Portuguese Tort Law: a Comparison with the Principles of European Tort Law*. In: *Kozioł, H., Steininger, B. (eds.), European Tort Law 2004*, Wien-New York, Springer, 2005, p. 643.

⁶⁵ Kodeks cywilny [Polish Civil Code] (1964), translation of Art. 43: Protection of personal interests. The provisions on the protection of the personal interests of natural persons apply accordingly to legal persons. Available: <https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU19640160093/U/D19640093Lj.pdf> [last viewed 19.04.2025].

⁶⁶ Polish Supreme Court, File No. III CZP 22/23. Available: <https://www.sn.pl/sites/orzecznictwo/orzeczenia3/iii%20czp%2022-23.pdf> [last viewed 19.04.2025].

⁶⁷ *Ibid.*, p. 53.

⁶⁸ French Civil Code [Code Civil] (2024). Available: https://www.legifrance.gouv.fr/codes/texte_lc/LEGITEXT000006070721. Available in English: https://www.trans-lex.org/601101/_/french-civil-code-2016/#head_36 [last viewed 19.04.2025].

damage.⁶⁹ In the legal literature, this has been held to be justified in particular by the distinction between the being (*l'être*) and the essence (*l'avoir*) of a legal person: what is pecuniary is related to the being and what is not pecuniary is the essence. In the case of damage to property, the appropriate remedy is compensation for pecuniary loss, whereas in the case of damage to essence, the appropriate remedy is pecuniary compensation for non-pecuniary loss.⁷⁰

To sum up, there is still no uniform approach to compensation for non-pecuniary damage to a legal person in national legal systems. There is also a divergence in the practice of applying and interpreting similar legal provisions, in so far as, even if the honour and reputation of a legal person are recognised as personal rights, this does not mean that the right to compensation for non-pecuniary damage is also recognised. There are, however, countries where the courts have considered it possible to recognise a legal person's right to compensation for non-pecuniary damage suffered on the basis of the general provisions on damages alone. The arguments in favour of one or the other position can be classified into a narrow approach (the legal person cannot suffer pain and suffering) and a broad approach (the violation of the non-pecuniary rights of legal persons could have no legal consequences at all if it is not recognised). However, it can be argued that there is a tendency towards an increasing recognition of the right of a legal person to compensation for non-pecuniary damage.

Summary

In principle, legal persons deserve the same level of legal protection as natural persons, although this principle is not fully reflected in the practice of Estonian legal system. In fact, the current framework does not guarantee equivalent legal protection for legal persons. This is particularly evident in cases where the reputation of a legal person is harmed by inappropriate value judgments.

A key issue in ensuring equal treatment is compensation for non-pecuniary damage to the legal person. The foregoing analysis shows that developments both at EU level and in the national legal systems of European countries are moving in the direction of allowing compensation for non-pecuniary damage to legal persons, at least in certain cases. In Estonia, too, serious consideration should be given to granting legal persons a right to claim non-pecuniary damage. To this end, it should be recognised in advance that a legal person can also be the owner of personal rights, or at least of non-pecuniary interests protected in the same way as personal rights.

The authors do not consider that the only solution is to provide absolute protection and “open the floodgates”, with the result that all legal persons would be able to obtain compensation for reputational damage. It is certainly worth considering “intermediate solutions”. For example, in the first instance, compensation for non-pecuniary damage could be granted to legal persons who, because of their sector of

⁶⁹ See judgment of the Commercial Chamber of the Cour de Cassation from 15 May 2012, No. 11-10278, Bull IV No. 101. Available: <https://eurotort.acdh-dev.oew.ac.at/archiv/case/detail/3059> [last viewed 19.04.2025].

⁷⁰ See more on French law *Brouillou, G.* Le préjudice moral des personnes morales. *Revue Juridique de l'Ouest*, 1, 2014, p. 25. Available: https://www.persee.fr/doc/juro_0990-1027_2014_num_27_1_4804 [last viewed 19.04.2025]; About the development of acceptance of non-pecuniary damages to legal entities in France, see *Giaoui, F. S.* Damage to Reputation: A Comparative Analysis of Pecuniary Compensation for Non-Pecuniary Harm. *The Loyola of Los Angeles International and Comparative Law Review*, 46(1), 2023, pp. 14–15.

activity or other, have a special position in society which could be undermined by damage to their reputation.

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<https://doi.org/10.22364/jull.19.02>

Conditional Release in Lithuania and Poland: Comparative Analysis


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The article¹ offers analysis of the legal framework of the institute of conditional release in Lithuania and Poland. In both countries, conditional release is considered a probationary measure to regulate prison overcrowding and promote effective social readaptation of convicts. The authors explore the concept of the conditional release at the international and national levels, reveal the content of the formal and substantive grounds of conditional release, and examine the similarities and differences in legal regulation of conditional release in Lithuania and Poland. In addition, the conditional release application statistics in Lithuania and Poland are compared. The authors argue that, despite their high prison population rates, Lithuania and Poland are reluctant to use some of the probation instruments, allowing for an early release

¹ The article is written as part of the research project “Alternatives to imprisonment in post-Soviet states”, which is financed by the Research Council of Lithuania (project funding agreement No. S-LL-21-6) under the funding program of joint research projects of Lithuania and Poland (DAINA-2) supported by the Council.

of detainees, such as the conditional release. Moreover, the policies of Poland and Lithuania regarding this institute's legislative regulation and criminal application seem insufficiently in line with international standards.

Keywords: conditional release, probation, international standards, criminal policy, Lithuania, Poland.

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Introduction

A map on the first page of the report presenting the key findings of the SPACE I survey of 2023² shows that the historical heritage of the Cold War continues to bear heavily on criminal policy across Europe. The Eastern part of the continent is darker than the Northern and Western parts, which indicates that prison population rates in post-Soviet countries are significantly higher than in other states. Generally, in post-Soviet countries, people are detained more often and for longer periods of time. The high prison population rates do not depend upon the country's population or geographical dimension (with the notable exception of Slovenia) – somehow, the shared past constitutes a more critical factor impacting the criminal and sentencing policies. Such is also the case with Lithuania and Poland.

At the beginning of 2021, Lithuania, which is one of the smallest European Union (further, EU) Member-States, with a population of about 2.85 million inhabitants, again had one of the highest prison population rates in the EU – 190 prisoners per 100 000 inhabitants, despite a remarkable decrease in the last 10 years.³ On the other hand, in Poland, with a population of about 37 million people, the incarceration rate in 2019 was nearly 50% higher than in 1990. And yet, it shows a definite downward trend for 2001–2014, when it was over 200⁴, and reached its highest level in 2006–2007, when it was over 230⁵. After a drop in 2021, when the prison population rate was equal to 179.4, it rose again in 2022 (190.4) and 2023, when it was 193.8.⁶ These rates are proof of a systemic problem that needs addressing.

² Aebi, M. F., Cocco, E. Prisons and Prisoners in Europe 2023: Key Findings of the SPACE I survey. 2024. Available: https://wp.unil.ch/space/files/2024/06/SPACE_I_2023_Key_Findings.pdf [last viewed 10.06.2024].

³ Aebi, M. F., Cocco, E., Molnar, L. SPACE I-2022 – Council of Europe Annual Penal Statistics: Prison populations, Council of Europe and University of Lausanne, 2023, p. 33. Available: https://wp.unil.ch/space/files/2024/01/240111_SPACE-I_2022_FinalReport.pdf [last viewed 23.04.2025].

⁴ In this article, the prison population rate provided is the number of prisoners per 100 000 inhabitants.

⁵ Gruszczyńska, B., Marczewski, M., Siemaszko, A., Ostaszewski, P., Włodarczyk-Madejska, J., Klimczak, J. (eds.). Atlas Przemocności 6 w Polsce [Atlas of Crime 6 in Poland]. IWS, Warszawa, 2021, p. 106.

⁶ Aebi, M. F., Cocco, E. SPACE I-2023. Council of Europe Annual Penal Statistics: Prison populations. Council of Europe, 2024, p. 33. Available: https://wp.unil.ch/space/files/2025/04/space_i_2023_report.pdf [last viewed: 23.04.2025].

Following the recommendations of the Committee of Ministers of the Council of Europe, most notably, Recommendation R(99)22 concerning prison overcrowding and prison population inflation,⁷ alternatives to detention could and should be one of the main tools to decrease the incarceration rates in Eastern Europe. They may be used at different stages of criminal proceedings or the stage of the execution of punishments. The most important alternative measure applied after conviction is the conditional release, which is correctly named “one of the most effective and constructive means of preventing reoffending and promoting resettlement, providing the prisoner with planned, assisted and supervised reintegration into the community.”⁸

The various aspects of conditional release have been analysed by Lithuanian and Polish academics, for example, in publications of Simona Mesonienė,⁹ Stefan Lelental,¹⁰ Ilona Michailovič, Liubovė Jarutienė,¹¹ Andželika Vosyliūtė,¹² Włodzimierz Wróbel,¹³ Mieczysław Ciosek,¹⁴ Gintautas Sakalauskas,¹⁵ etc. On the other hand, none of the publications mentioned above in Lithuania or Poland have presented an in-depth comparative analysis of the legal regulation and practical application of the conditional release in the two neighbouring countries.

Primary goals of this article are, as follows: 1) to explain the concept of the conditional release in international and national levels; 2) to disclose and

⁷ Recommendation Rec(99)22 concerning prison overcrowding and prison population inflation. Compendium of Conventions, Recommendations and Resolutions relating to Prisons and Community Sanctions and Measures. Strasbourg, Council of Europe Publishing, 2021, pp. 166–169.

⁸ Recommendation Rec(2003)22 on conditional release (parole). Available: <https://search.coe.int/cm/?i=09000016805df03f> [last viewed 15.04.2025].

⁹ *Mesonienė, S.* Lygtinio paleidimo instituto retrospektyva užsienio valstybėse ir Lietuvoje [The retrospective of parole release in foreign countries and Lithuania]. *Jurisprudencija*, 2010, No. 3 (121); *Mesonienė, S.* Teisiniai lyginamieji lygtinio paleidimo iš pataisos įstaigų aspektai [Parole: comparative legal aspects]. *Jurisprudencija*, 5(83), 2006, pp. 73–81.

¹⁰ *Lelental, S.* Warunkowe przedterminowe zwolnienie. System Prawa Karnego. Kary i środki karne. Poddanie sprawcy próbie [Conditional Early Release. In: The Criminal Law System. Penalties and Penal Measures. Placing the Offender on Probation]. 2010, pp. 1064–1142.

¹¹ *Michailovič, I., Jarutienė, L.* Factors that influence parole boards' and judges' decisions on parole application in Lithuania. *Baltic Journal of Law & Politics*, 10(1), 2017.

¹² *Vosyliūtė, A.* Lygtinis paleidimas kaip integracijos prielaida: teismų sprendimų problemos. Bausmių taikymo ir vykdymo tarptautinis palyginimas, tendencijos ir perspektyvos Lietuvoje [Conditional Release as a Prerequisite for Integration: Problems in Court Decisions. In: International Comparison of Sentence Application and Enforcement, Trends and Perspectives in Lithuania]. Vilnius, 2017, pp. 205–231; *Vosyliūtė, A.* Lygtinio paleidimo iš pataisos namų taikymo teismų praktikoje probleminiai aspektai. Bausmių vykdymo sistemos teisinis reguliavimas ir perspektyvos Lietuvos Respublikoje [Problematic Aspects of the Application of Conditional Release from Correctional Institutions in Court Practice. In: Legal Regulation and Perspectives of the Sentence Enforcement System in the Republic of Lithuania]. Vilnius, 2010, pp. 95–115.

¹³ *Wróbel, W.* Glosa do uchwały pełnego składu Izby Karnej SN z dnia 11.I.1999 r. I KZP 15/98 (dot. zastosowania przepisów nowego k.k. w odniesieniu do spraw warunkowego przedterminowego zwolnienia) [Commentary on the Resolution of the Full Chamber of the Criminal Division of the Supreme Court of 11 January 1999, Case No. I KZP 15/98 (concerning the application of the provisions of the new Criminal Code to cases of conditional early release)]. *Państwo i Prawo*, 3, 1999, p. 106.

¹⁴ *Ciosek, M.* Psychologia sądowa i penitencjarna [Judicial and Penitentiary Psychology]. Warszawa, 2001.

¹⁵ For example: *Sakalauskas, G.* Non-custodial sanctions and measures in Lithuania: A large bouquet with a questionable purpose and unclear effectiveness. Promoting non-discriminatory alternatives to imprisonment across Europe. Non-custodial sanctions and measures in the member states of the European Union. Lithuania, Coimbra: Instituto Jurídico Faculdade de Direito da Universidade de Coimbra, Colégio da Trindade, 2021.

compare legal application of conditional release preconditions (formal and substantive ground) in Lithuania and Poland; 3) to analyse and compare the statistics of practical application of conditional release in both countries. The authors of this article argue that, despite their high prison population rates, Lithuania and Poland are reluctant to use some of the probation instruments, allowing for an early release of detainees, such as the conditional release.

1. The concept of conditional release in international and national systems and the formal grounds of its application

The institute of conditional release is usually indicated in the legal acts of the Committee of Ministers of the Council of Europe. It should be noted that these legal acts are usually not mandatory but are recommendations. These recommendations describe the content and aim of conditional release and continuously promote the use of conditional release in the Member States of the Council of Europe.¹⁶

According to Recommendation Rec(2006)2-rev on the European Prison Rules,¹⁷ steps must be taken to ensure a gradual return of prisoners to life in a free society, and it may be achieved by partial or conditional release under supervision combined with adequate social support. Undoubtedly, the most important is the Council of Europe Recommendation Rec(2003)22 on conditional release (parole),¹⁸ which states “[...] that conditional release is one of the most effective and constructive means of preventing reoffending and promoting resettlement, providing the prisoner with planned, assisted and supervised reintegration into the community.” According to the Recommendation, a conditional release “is a community measure” and means “the early release of sentenced prisoners under individualised post-release conditions.”

Meanwhile, EU legal acts (as well as Council of Europe conventions¹⁹) envisage the institute of conditional release only indirectly, as a measure that can be applied in the cases of the transfer of execution of imprisonment or probation measures in another state. For example, Council Framework Decision 2008/947/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions,²⁰ which regulates the transfer of those convicted by probation measures, indicates that “probation decision shall mean a judgment or a final decision of a competent authority of the issuing State taken based on such judgment: (a) granting a conditional release”. Furthermore, Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of

¹⁶ For example, Recommendation CM/Rec(2010)1 on European probation rules. Available: <https://search.coe.int/cm?i=09000016805cfbc7> [last viewed 21.04.2025], etc.

¹⁷ Recommendation Rec(2006)2-rev on the European Prison Rules. <https://search.coe.int/cm?i=09000016809ee581> [last viewed 20.04.2025].

¹⁸ Recommendation Rec(2003)22 on conditional release (parole). Available: <https://search.coe.int/cm?i=09000016805df03f> [last viewed 15.04.2025].

¹⁹ For example, Convention on the Transfer of Sentenced Persons (1983) and its additional protocols (1997, 2017). Available: <https://rm.coe.int/1680079529> [last viewed 21.04.2025]; etc.

²⁰ Council Framework Decision 2008/947/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions. OJ L 337, 16.12.2008, pp. 102–122.

their enforcement in the European Union,²¹ which regulates the transfer of those convicted by imprisonment, stipulates that “Member States may provide that any decision on early or conditional release may take account of those provisions of national law, indicated by the issuing State, under which the person is entitled to early or conditional release at a specified point in time”.

Thus, EU legal acts and the Council of Europe recommendations describe conditional release as a tool helping to avoid de-socialisation of prisoners, reducing incarceration length, and setting the conditions for its transfer for execution in another state. Furthermore, the Recommendation on conditional release (parole) also distinguishes two types of release – mandatory and discretionary conditional release systems, and specifies their essential requirements. In the meantime, the definition and legal significance of the conditional release and the choice of the conditional release system are left to the competence of national legislators. It should be noted that Lithuania and Poland have chosen a discretionary release system (with certain features of a mandatory system),²² according to which the imprisoned person, for example, in Lithuania, must serve a specific part of the punishment (formal ground) and demonstrate during the execution of imprisonment that their risk of criminal behaviour is low or that they have made evident progress in reducing it (substantive ground).

Various definitions of conditional release can be found in Lithuanian academic publications. According to Simona Mesonienė, conditional release is a form of release of a convict from serving full imprisonment time, whereby specific conditions are established, and the convict is encouraged to reform themselves further, subject to institutional supervision.²³ Andželika Vosyliūtė states that conditional release is a form of serving the deprivation of freedom sentence awarded by the court²⁴ (such a position was confirmed by the European Court of Human Rights in the case *D. Ganusauskas v. Lithuania*²⁵). Ilona Michailovič and Liubovė Jarutienė mention that the judges in Lithuania treat conditional release as “an opportunity to motivate the sentenced individuals” and “an opportunity for the sentenced individuals to return to society”.²⁶ According to Gintautas Sakalauskas, the potential application of conditional release

²¹ Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union. OJ L 327, 05.12.2008, pp. 27–46.

²² On the conditional release systems and their essence, see: *Tournier, P. V.* Systems of Conditional Release (Parole) in the Member States of the Council of Europe. Between the principle of equality and individualization, pragmatism. *Champ Penal-Penal Field, Varia*, 1, 2004. Available: <https://journals.openedition.org/champpenal/378> [last viewed 23.04.2025].

²³ *Mesonienė, S.* Teisiniai lyginamieji, p. 75.

²⁴ *Vosyliūtė, A.* Lygtinis paleidimas, p. 208.

²⁵ The European Court of Human Rights recalls that the “Convention does not confer, as such, a right to release on licence or require that parole decisions be taken by or subject to review by a court. A penalty involving deprivation of liberty, which the offender must undergo for a period specified in the court decision, is justified at the outset by the original conviction and appeal proceedings [...]. In the present case, the order for the applicant’s conditional release did not in any way affect the validity of the trial court’s judgment and the subsequent appeal procedures by which the applicant was convicted and sentenced to six years’ imprisonment. Nothing indicates that the causal link between the conviction and the re-detention was broken” (see: ECtHR decision on inadmissibility of application No. 47922/99 by *D. Ganusauskas v. Lithuania*. Available: GANUSAUSKAS v. LITHUANIA (coe.int) [last viewed 25.04.2025].

²⁶ *Michailovič, I., Jarutienė, L.* Lygtinio paleidimo iš pataisos įstaigų taikymo problemos Lietuvoje [The Problems of Parole Application in Lithuania]. *Kriminologijos studijos*, 4, 2016, pp. 162–163.

is one of the factors encouraging positive behaviour of sentenced individuals serving their prison sentences. In addition, it allows for limiting the negative effects of imprisonment, encourages the responsibility and self-sufficiency of the conditionally released, decreases the number of prisoners and the costs associated with prisons, etc.²⁷

According to the Lithuanian Law on Probation,²⁸ conditional release in Lithuania is described as a conditional alternative to an imposed imprisonment during which the conditionally released person is supervised. This form of probation aims to ensure the effective resocialization of conditionally released individuals and reduce the recidivism of their criminal acts. In Lithuania, conditional release falls only within the remit of the Commission²⁹ on conditional release (for example, in cases of prisoners sentenced for negligent crimes) and in some cases (for example, in cases of prisoners sentenced to more than 10 years but less than 25 years of imprisonment), the decision of the Commission on conditional release has to be confirmed by the court. The conditional release application grounds are provided in the Code of Punishments Execution³⁰ of Lithuania (further, CPE of Lithuania).

The Polish criminal law and punishment execution doctrine describes conditional release as a probation measure,³¹ an alternative to imprisonment³² or the final stage of serving a prison sentence.³³ In addition, the Polish doctrine emphasizes

²⁷ Sakalauskas, G. Lygtinis paleidimas iš įkalinimo įstaigų įsigaliojus Probacijos įstatymui: teorija ir praktika [Release from prison on probation after the entry into force of the Probation Act: Theory and practice]. *Teisės problemos*, 4(82), 2013, pp. 11–15.

²⁸ Lietuvos Respublikos probacijos įstatymas [Law on Probation of Lithuania]. *Valstybės žinios*, 2012, Nr. 4-108.

²⁹ In 2012, nine Commissions on conditional release were established to assess better an individual's readiness to return to society and impose obligations and measures to be fulfilled during the conditional release. However, these regulatory changes created a conditional release decision-making system, where an individual's readiness to be released is first assessed by the commission on conditional release, but the commission's decision must be subsequently sustained by the court. The legislator sought to envisage a formal role for the court, assessing if the decision was adopted in compliance with the applicable formal requirements, but not evaluating its merits (reasonableness). However, practice evolved in a somewhat different direction, and the courts assessed not only the legal criteria of the decision on conditional release, but also the merits of the decision. Consequently, a double-filter conditional release system was formed, whereby two bodies must make decisions based on the same criteria and issue (see: *Nikartas*, S. Nuomonė atsakant į 2018-03-23 raštą Nr. (1.39) JR-2071 pateikta Lietuvos Respublikos Teisingumo ministerijai [Opinion in Response to the Letter No. (1.39) JR-2071 of 23 March 2018, Submitted to the Ministry of Justice of the Republic of Lithuania by Letter]. *Teisės e-aktualijos*, Nr. 2(15), 2018, pp. 19–22). Such a decision-making procedure formed by the courts that does not comply with the law, and difficulties in attracting society's representatives to serve as members of the commissions, as well as examples where in separate cases, the decision of conditional release depended on the composition of the commission (see: *Michailovič, I. Jarutienė, L. Lygtinio paleidimo*, p. 152; *Sakalauskas, G., Jarutienė, L., Kalpokas, V., Vaičiūnienė, R. Kalinimo sąlygos*, p. 222), were criticized by proposing to establish a professional conditional release commission. In 2025, a newly formed single centralized commission (composed of 11 members) began its activity. Moreover, to ensure the prevention of corruption and impartiality, as well as the misuse of information, for the first time in history, the commission considered anonymized information when solving the question of a specific convict's conditional release.

³⁰ Lietuvos Respublikos bausmių vykdymo kodeksas [Code of Punishments Execution of Lithuania]. *Valstybės žinios*, Nr. 73-3084, 2002; *TAR*, Nr. 15495, 2022-07-14.

³¹ *Lelental, S. Warunkowe przedterminowe*, pp. 1064–1142.

³² *Kuczyńska, H. Kształt i praktyka stosowania warunkowego przedterminowego zwolnienia. Alternatywy kary pozbawienia wolności w polskiej polityce karnej* [The Form and Practice of Applying Conditional Early Release. Alternatives to Imprisonment in Polish Criminal Policy], 2009, pp. 170–225.

³³ *Świda, Z. Charakter i stosowanie instytucji warunkowego przedterminowego zwolnienia z odbycia reszty kary pozbawienia wolności. Nauki penalne wobec problemów współczesnej przestąpczości. Księga jubileuszowa z okazji 70 rocznicy urodzin Profesora Andrzeja Gaberle* [The Nature and Application

that the application of conditional release is based on scientific knowledge about the harmful effects of closed-type institutions, imprisonment in them, and the need to proportionally change the form of serving a sentence, taking into account changes in the personality of the convicted person.³⁴ The decision on the conditional release application in Poland is the court's competence in all cases.

In the Polish legislative system, the institute of conditional release is regulated in two legal acts: the Penal Code (further, PC of Poland) and the Penal Executive Code (further, PEC of Poland).³⁵ Articles 77–80, 82 of the PC of Poland regulate the substantive and formal grounds of this institute and the consequences of the expiry of the probationary period, while the procedure for application, the determination of obligations during the probationary period, the course of supervision and the revocation of conditional release are regulated by the provisions of the Articles 159–163 of the PEC of Poland. It should be noted that the conditional release, as an institute of a probationary nature, was regulated in all Polish criminal codifications (1932, 1969, and 1997). It is also necessary to remember the economic value of this institute – supervision of the convict in free conditions is cheaper than his/her long-term stay in prison. Conditional release is also a regulator of the prison population and an instrument that prevents prison overcrowding. Currently, there are three prerequisites of the conditional release: shortening the execution of the imprisonment being served, the convict's consent to establishing a specific contract, and providing support to the convict and placing him/her under judicial and probation supervision.

In both countries, the application of conditional release is connected with the actually served part of a sentence. According to Article 82 of CPE of Lithuania, conditional release may be granted to prisoners who have actually served the following minimum parts of their sentences: 1) after serving one-third of the imprisonment imposed – persons sentenced for negligent crimes, juveniles and other inmates if the sentence imposed does not exceed 4 years; 2) after serving half of the imprisonment imposed – prisoners sentenced for a sentence of more than 4 years and less than 10 years; (3) after serving two-thirds of the imprisonment imposed – prisoners sentenced to more than 10 years but less than 25 years of imprisonment. Prisoners not released after the above-mentioned term (except high-risk criminal behaviour offenders and persons sentenced for grave crimes or some serious crimes) are automatically released under the control of e-monitoring after serving three-quarters of the imprisonment imposed. Moreover, all prisoners who have not served a disciplinary penalty for a breach of discipline committed while serving a sentence may be released at least 3 months after the disciplinary penalty has been served.

It should be noted that the minimum term stipulated in the law, which must be fulfilled for conditional release, is consistently getting shorter, but it also has a negative impact on practice, since commissions on conditional release and courts often do not apply conditional release because a large part of the imprisonment remains to be served.³⁶ Besides, some authors emphasize that the differentiation

of the Institution of Conditional Release from the Remainder of a Prison Sentence. In: *Penal Sciences in the Face of Contemporary Crime Problems. Jubilee Book on the Occasion of the 70th Birthday of Professor Andrzej Gaberle*, 2007, pp. 373–374.

³⁴ *Ciosek, M.* Psychologia sądowa, pp. 216–217; *Studen, S.* Współczesne koncepcje depersonalizacji. Zdrowie Psychiczne [Contemporary Concepts of Depersonalization. Mental Health., 1983, pp. 30–36.

³⁵ Ustawa z dnia 6 czerwca 1997 r. kodeks karny [Act of 6 June 1997 – Criminal Code], Dz.U. z 1997 r., Nr 88, poz. 553 ze zm.; Ustawa z dnia 6 czerwca 1997 r. kodeks karny wykonawczy [Act of 6 June 1997 – Executive Criminal Code], Dz.U. z 1997 r., Nr 90, poz. 557 ze zm.

³⁶ *Vosyliūtė, A.* Lygtinis paleidimas, p. 215.

of conditions for conditional release, based on the duration of the sentence, is not in line with the purpose of punishment's execution – resocialization, as the needs and opportunities for resocialization depend on the person and not on the length of the sentence imposed. Additionally, the length of punishment depends primarily on the severity of the crime, which the legislator already takes into account when establishing appropriate lengths of imprisonment in the sanction of the article of the Criminal Code of Lithuania.³⁷

The formal prerequisites for the application of conditional release in Poland are regulated in Article 77 of the PC of Poland. These prerequisites are mandatory, meaning the convict must obligatorily meet them to apply for conditional release. They also consist of serving a specific period of the sentence imposed. As a rule, a convict can be conditionally released after serving at least half of the sentence, and for a convict sentenced to a term of not less than 25 years – after serving 15 years of imprisonment. A convict under conditions of ordinary recidivism can be released after serving two-thirds of the sentence imposed, and under conditions of multiple recidivism, after serving three-fourths. A prisoner sentenced to life imprisonment may be conditionally released after serving 30 years of their sentence. The PEC of Poland also provides for a conditional release after a break in sentence. The formal requirements are, as follows: the sentence imposed must not be longer than 3 years, the convict has served at least 6 months of the sentence, and the break in sentence granted to him/her lasted at least 1 year.

These terms are instructive for the penitentiary court and are only minimum thresholds for applying the conditional release. Conditional release is imposed for a trial period, which, as a rule, is equal to the period remaining to serve the sentence in full, but must be between 2 and 5 years, for a repeating offender it cannot be shorter than 3 years, for a person sentenced to 25 years or more it must be at least 10 years, while for a person sentenced to life imprisonment the trial period lasts for life. In addition, the court may order probation for the probationary period and oblige the convict to fulfil certain obligations.

A comparison of the legal regulations and scientific approaches in Poland and Lithuania shows that in both countries, conditional release, following international recommendations, is described as a probationary measure, the essence of which is the performance of a specific (traditionally, the last) part of imprisonment not in a penitentiary facility, but while free in society with certain obligations (restrictions) and under the supervision (*inter alia*, e-monitoring) of probation services. In both countries, a discretionary conditional release model is applied, according to which the convict must serve a specific part of the imposed imprisonment (formal ground), and the prediction of their behaviour that allows for the conclusion that the person shall not commit a new crime again (substantive ground). It should be emphasized that in Poland, a more exhaustive list of categories of specific parts of imposed imprisonment to be served to apply the conditional release is provided, and these terms are longer than those provided in Lithuania.

2. Substantive ground of application of conditional release

As to the substantive ground, in Lithuania, the conditional release can be granted for prisoners with a “low risk of criminal behaviour” or who “have made evident progress” in reducing the risk of their criminal behaviour. The definition

³⁷ Sakalauskas, G. Non-custodial sanctions, p. 8.

of the progress of risk reduction (presented in Article 82 CPE of Lithuania) is obscure and does not specify how risk reduction progress should be estimated, so it induces various interpretations. It should be noted that for the decision on conditional release, the conclusion of the social investigation must be submitted, which contain information about the resocialization measures applied to this convict and the results of their implementation, the risk of his/her criminal behaviour and the changes related to this risk during the execution of the sentence. This means that social behaviour analysis in the conclusion prepared by the imprisonment facility and an individual's criminal behaviour risk assessment play an essential role in establishing the substantive grounds for conditional release. In 2012, the director of the Prisons' Department of Lithuania approved 6 methodologies for assessing the risk of criminal behaviour.³⁸ OASys methodology is best known.³⁹ It requires an assessment of the convict's personality before the commission of the crime and during the execution of the sentence, and the obtained results are reflected in the conclusion of the social investigation (which can indicate low, medium, or high risk). Some scientists noticed that commissions on conditional release tend to apply conditional release when the risk of the convict's criminal behaviour is low or moderate. In contrast, judges tended to apply conditional release when inmates were classified as low-risk only.⁴⁰ Moreover, the Lithuanian court practice shows that while deciding on the issue of conditional release, courts were relying not on final conclusions of the social investigation and the risk of criminal behaviour calculated according to the OASys assessment methodology, but selecting certain circumstances from the documents mentioned above and giving them priority over the final conclusions of the social investigation.⁴¹ For example, when making a decision on conditional release, it is based on the convict's criminal history (number

³⁸ HCR-20 Assessing Risk for Violence; Historical, Clinical, Risk Management; SV Hare Psychopathy Checklist: Screening Version; SVR-20 The Sexual Violence Risk; SARA – The Spousal Assault Risk Assessment; Brief Spousal Assault Form for the Evaluation of Risk; OASys – The Offender Assessment System. (See more: Kalėjimų departamento prie Lietuvos Respublikos teisingumo ministerijos direktoriaus 2012 m. birželio 25 d. įsakymas Nr. V-211 dėl nusikalstamo elgesio rizikos vertinimo metodikų ir elgesio pataisos programų aprobavimo Lietuvos bausmių vykdymo sistemoje tvarkos aprašo patvirtinimo ir adaptuotų nusikalstamo elgesio rizikos vertinimo metodikų ir elgesio pataisos programų aprobavimo [Order No. V-211 of the Director of the Prison Department under the Ministry of Justice of Lithuania, dated 25 June 2012, On the Approval of the Procedure Description for the Validation of Criminal Behavior Risk Assessment Methodologies and Behavioral Correction Programs in the Lithuanian Penal Enforcement System and the Validation of Adapted Criminal Behavior Risk Assessment Methodologies and Behavioral Correction Programs]. *Valstybės žinios*, Nr. 72-3770, 2012. Available: <https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/TAIS.428643/asr> [last viewed 23.04.2025].

³⁹ OASys methodology is composed of 12 empirically tested static and dynamic risk of criminal behaviour measurement criteria: 1) criminal history (past and present offences); 2) analysis of committed crimes; 3) assessment of living conditions (what is the quality of one's dwelling location); 4) education, studying and ability to find employment (history of education and employment); 5) finances and income (individual's ability to utilise their income); 6) relationships (quality of individual's relationships with others as well as its influence on criminal behaviour is assessed); 7) lifestyle and circle of friends (hobbies and whom does one interact with); 8) drug abuse; 9) alcohol abuse; 10) emotional well-being (emotional issues adversely affecting one's and related individuals' daily life); 11) reasoning and behaviour (nuances of individual's reasoning, especially in relation with social problems); 12) one's own perception of committed crimes and supervisory measures imposed (see: Čėsniėnė, I., Laurinavičius, A., Ūstinavičiūtė, L. Nusikalstamo elgesio rizikos vertinimas Lietuvoje: esama situacija ir raidos tendencijos [Criminal risk assessment in Lithuania: current situation and future trends]. *Kriminologijos studijos*, No. 3, 2015, p. 65).

⁴⁰ Vosyliūtė, A. Lygtinis paleidimas, pp. 224–225; Michailovič, I., Jarutienė, L. Factors that influence parole, p. 238.

⁴¹ Sakalauskas, G., Jarutienė, L., Kalpokas, V., Vaičiūnienė, R. Kalinimo sąlygos, pp. 218–219.

of convictions, nature of crimes committed, etc.), part of the imprisonment served, implementation of a social rehabilitation plan,⁴² previously applied conditional release or suspension of the sentence execution, compensation of damages,⁴³ etc. The results of research show that conditional release in most cases is not applied because: a) the served part of the imprisonment has been too brief; b) due to the poor motivation of the convict himself/herself; c) high risk of repeated criminal behaviour or no reduction in the level of such risk; d) the convict does not implement the social rehabilitation plan; e) the convict does not have a place of residence; f) the convict does not maintain relations with their relatives; g) in cases of “publicly resonant” crimes.⁴⁴

As in Lithuanian law, in the Polish legal system, the substantive ground (provided in the PC of Poland) is also subject to verification when making a decision on conditional release. Their summation to form a positive criminological prognosis of the offender, i.e., a reasonable belief that the conditionally released person will observe the rule of law and fulfil the obligations imposed for the probationary period and, in particular, will not commit a new crime again. The court examines the following substantive circumstances: attitude, personal qualities and conditions, circumstances surrounding the commission of the crime, behaviour after the commission of the crime, and behaviour while serving the sentence. According to the Polish case law, it is emphasized that the penitentiary court should assess the entire period of serving the sentence and incidental failures of the convict to comply with the prison regulations should not affect the comprehensive assessment of the criminological prognosis, since the process of rehabilitation may proceed unevenly and not simultaneously in all periods of serving the sentence. At the same time, however, the mere absence of educational troubles and regulatory offenses, as well as compliance with the instructions of prison staff, are insufficient to establish a positive criminological prognosis justifying the granting of conditional release, which, by its very nature, should be not only meritorious but, above all, expedient. In particular, it is recognized that decisions on conditional release should not be based on general preventive goals and only individual preventive goals, taking into account only the corrective purposes of punishment: rehabilitation and correction. It should also be borne in mind that the penitentiary court should not delay too long in granting conditional release to a convict who has acquired the entitlement, as this could cause a gross disproportion between the punishment covered by the conditional release and the probation period. Ensuring minimum standards of adjudication in cases of conditional release requires precise determination of the content of each substantive premise, which, as Stefan Lelental notes, is theoretically and practically not feasible.⁴⁵

Furthermore, it should be noted that different groups of prisoners excluded from the possibility of a conditional release application in Poland and Lithuania can be identified. For example, in Lithuania, according to the Article 83 of the CPE the following groups of prisoners are excluded from the conditional release: a) individuals sentenced for Crimes against the Independence, the Territorial Integrity and the Constitutional Order of the State of Lithuania; b) individuals sentenced for sexual crimes against minors; c) individuals sentenced for intentional crimes

⁴² Michailovič, I., Jarutienė, L. Lygtinio paleidimo, pp. 159–160.

⁴³ Vosyliūtė, A. Lygtinis paleidimas, pp. 221–223.

⁴⁴ Michailovič, I., Jarutienė, L. Lygtinio paleidimo, pp. 152, 172, 179; Vosyliūtė, A. Lygtinis paleidimas, pp. 215, 224.

⁴⁵ Lelental, S. Warunkowe przedterminowe, pp. 1064–1142.

committed during temporary detention, custody, arrest or serving imprisonment; and, since the most recent amendments of law, d) individuals sentenced for Crimes against Humanity and War Crimes.⁴⁶ The question of those to whom conditional release cannot be applied is under discussion. For example, as noted by Gintautas Sakalauskas, blocking the ability to apply conditional release to individuals who have committed sexual crimes against minors prevents full implementation of the requirements of Article 1 of the CPE of Lithuania, which states that the purpose of the laws on the execution of punishment is to establish such a procedure for executing the punishments that, after serving the sentence, the convicted person shall pursue their life goals legally. Additionally, the non-application of conditional release when individuals are sentenced for intentional crimes committed during temporary detention, custody, arrest, or serving an imprisonment is also criticized. Gintautas Sakalauskas raised the question whether a crime committed in an imprisonment facility and of itself (without any conditions) should eliminate the possibility of granting conditional release, since registration of committed crimes depends on the relations between the prisoners and the institution's employees, and the latency of crimes in prisons is high.⁴⁷

In Poland, specific categories of convicts have also been specified by the provisions of the PC of Poland, for whom the possibility of applying the conditional release has been significantly reduced or completely abolished. The difference in Poland's case is that, in particularly justified cases, the criminal court may, when imposing the sentence, set even stricter formal restrictions to apply for conditional release than those provided for under the general rules. In this case, there are no guidelines for extending the term, which provides room for a great deal of judicial discretion. This may be incompatible with the principle of individualization of serving a sentence and undermine the effectiveness of rehabilitation through imprisonment. This provision is a kind of vote of no confidence concerning the penitentiary court. The assumption is that it may treat the convict too liberally and allow him/her to leave prison too soon.⁴⁸

In Poland, the limit on the minimum sentence necessary to serve in order to apply for conditional release was set at as much as 40 years, which *de facto* excluded specific categories of convicts from benefiting from this institute. This causes a sense of hopelessness, which leads the convicted person to lose responsibility for his conduct.

What is more, when imposing a life imprisonment for an act committed after a final conviction for a crime against life, health, sexual freedom, against public security, or of a terrorist nature, for a sentence of more than 20 years' imprisonment or life imprisonment, the court may impose a total ban on conditional release. When imposing a sentence of life imprisonment, the court may impose a prohibition of conditional release, if the nature and circumstances of the act and the personal characteristics of the offender indicate that their remaining at liberty will cause

⁴⁶ The legislator has amended the list of situations when the conditional release cannot be applied a couple of times. For example, from 1 May 2003 to 1 July 2012, conditional release could not be applied to individuals serving their sentences in imprisonment institutions in disciplinary group conditions. Such an exception was criticized, stating that the law provided for many opportunities for prison administration to punish the prisoners disciplinarily and limit their conditional release possibilities (see: Sakalauskas, G. Lygtinio paleidimo sistema ir korupcijos rizika [The Conditional Release System and the Risk of Corruption]. Vilnius, 2010, p. 16). Currently, the law does not prohibit applying conditional release in such situations.

⁴⁷ Sakalauskas, G. Lygtinis paleidimas, p. 19.

⁴⁸ Wróbel, W. Glosa do uchwały, p. 106.

a permanent danger to the life, health, freedom, or sexual freedom of others. The prohibition on applying for conditional release of specific categories of convicts, established at the adjudication stage, is inconsistent with the European Prison Rules and Recommendation on conditional release (parole). The basic justifications for the desirability and rationality of granting conditional releases are based on scientific knowledge of the harmful effects of total institutions, the prisonization that occurs in them, and the necessity of modifying the sentence during its serving in proportion to the changes occurring in the convict's personality.⁴⁹ Judgment on extending the period to apply for conditional release or its total prohibition at the time of sentencing should be assessed as absurd and excessively punitive.

A comparison of the legal regulations and scientific approaches in Poland and Lithuania shows that in both countries, the substantive ground of conditional release is practically identical, and consists of an assessment of the convicted individual's personality and behaviour, leading to the conclusion that the person shall fulfil imposed obligations (restrictions) during the probationary period and will not commit a new crime again. In Lithuania, the determination of the substantive ground for conditional release is based on a more formalised criminal behaviour risk assessment and a conclusion prepared by the imprisonment facility. It should be noted that in both Lithuania and Poland, in court practice, the decision on conditional release in some instances is determined not by the overall assessment of the convict, but by individual aspects of the assessment. In both countries, the law provides for specific groups of prisoners excluded from the conditional release application. Moreover, in Poland, criminal courts have the discretion to set stricter formal restrictions to apply for conditional release, which is impossible in Lithuania.

3. Application of conditional release in practice

In almost every program of the governments of Lithuania since regaining independence in 1990, the question of the conditional release regulation has been mentioned. For example, the program of the XVIII Government of Lithuania (adopted in 2020) stated that improving the conditional release system by establishing the most precise possible criteria and procedures of its implementation is one of the government's priority tasks.⁵⁰ Despite the constant essential changes in conditional release regulation in 1995, 1999, 2003, 2012, 2015 and 2020, the aim of which most often was motivated by the wish to decrease incarceration rates in Lithuania and take into account the needs of convicts, the application of conditional release in practice can be described as often not complying with the declared objectives, unstable and inconsistent.

For example, 1995–2003 was characterized by the highest number of prisoners in Lithuania. In 1996, there were 13 002 prisoners, in 1999 – 14 596 prisoners, and in 2002 – 11 566 prisoners⁵¹, but at the same time, conditional release was also widely applied (for example, in 1995 – 4495 prisoners were conditionally released, in 2002 – 4211 prisoners, in 2003 – 4927 prisoners, etc.). Meanwhile, in other periods (2012–2018 and 2019–2022), the number of prisoners consistently decreased, e.g., from

⁴⁹ *Ciosek, M.* Psychologia sądowa, pp. 216–217; *Studen, S.* Współczesne koncepcje, pp. 30–36.

⁵⁰ Lietuvos Respublikos Seimo nutarimas dėl XVIII Lietuvos Respublikos Vyriausybės programos Nr. XIV-72 [Resolution of the *Seimas* of the Republic of Lithuania on the XVIII Government Programme of Lithuania No. XIV-72]. TAR, 2020-12-11, Nr. 27121.

⁵¹ The Lithuanian statistics referred to in the article are official statistics of the Lithuanian National Courts Administration, Lithuanian Prison Service and Lithuanian Probation Service.

Table 1. Number of requests examined by the Commission and number of conditionally released persons in Lithuania

Year	Number of requests examined by the Commission on conditional release	Number of conditionally released persons
2016	No data	826
2017	No data	629
2018	No data	449
2019	No data	430
2020	No data	984
2021	2729	889
2022	2682	926
2023	3017	1057

8413 (2012) to 5799 prisoners (2018); from 5635 (2019) to 4270 prisoners (2022). At the same time, the application of conditional release also decreased, for example, from 1198 conditionally released (2012) to 449 conditionally released (2018).

The application of conditional release was also inconsistent, as the comparison of statistical data of individual periods shows significant fluctuations (see Table 1). For example, from 1995 to 1997, there were around 12 000 prisoners, and conditional release was applied to an average of 3800 convicts. From 1998 to 2000, there were around 14 100 prisoners, and conditional release was applied to an average of 3150 convicts. From 2002 to 2004, there were around 10 200 prisoners, and conditional release was applied to an average of 3882 convicts. After the 2012 reform related to the adoption of the new Lithuanian Law on Probation, statistics for individual periods show an even more significant decrease in the use of conditional release: in 2012–2015, on average each year, there were 8085 prisoners, and conditional release was applied to 1109 convicts on average, and in 2016–2018 – an average each year of 6060 prisoners, and conditional release was applied to an average of 635 convicts. In 2020–2022, on average each year, there were 4644 prisoners, and the application of conditional release increased to an average of 897 convicts.

Thus, the statistics of the application of conditional release permit to state that the declared goals of reducing the number of prisoners and considering the needs of convicts were not achieved.⁵² However, it should be noted that when evaluating the last reform of 2020 and its results during 2020–2023, we can currently agree with the opinion expressed in the doctrine that “it is not clear if this is a new trend.”⁵³ Finally, it is worth noting the stereotype often stressed in the Lithuanian media that conditionally released individuals are likely to commit repeated crimes and are dangerous to society. However, Lithuania’s statistics and scientific research⁵⁴ do not confirm such a stereotype; for example, in 2020, only 12 persons, and in 2021, only 7 persons, committed new crimes during the conditional release period.

⁵² Declared goals were achieved only by the reform of the entire criminal justice system implemented in 2003, during which the new Criminal Code, Code of Criminal Procedure and CPE of Lithuania were adopted and entered into force.

⁵³ Sakalauskas, G. Non-custodial sanctions, p. 13.

⁵⁴ Sakalauskas, G., Jarutienė, L., Kalpokas, V., Vaičiūnienė, R. Kalinimo sąlygos, p. 410.

In Poland, for the analysis of changes in the dynamics of the incarcerated, it is necessary to consider the numerous amnesties carried out in 1974, 1977, 1981, 1983, 1984, 1986, and 1989, which largely influenced the decrease in the number of inmates.⁵⁵ The latest Polish official penitentiary statistics are available for 2022 in the form of the Annual Statistical Information of the Ministry of Justice and the Central Board of the Penitentiary Service,⁵⁶ which show trends in penitentiary policy similar to those observed in Lithuania. The number of incarcerated in Poland in 2021 was 71 209; in 2022, it was 72 513.

Several factors influence the regulation of the prison population. Still, the most significant should be considered, among others, legislative changes, consisting in the criminalization or decriminalization of some social problems, the general level of legal culture of society, manifested, on the one hand, in the willingness to report crimes, on the other hand, in the reliability of formalized social control bodies to record reports, evidentiary activity during court proceedings and, finally, the policy of applying conditional release. As for the legislative changes in recent years in Poland, quite significant in reducing inmates was the legislative change of 2013, involving the repeal of Article 178a para. 2 of the PC of Poland, which reclassifies driving a vehicle other than a motor vehicle, in a residential zone or traffic zone, under the influence of alcohol or drugs as a misdemeanour. As a result of this legislative change, there was a change in the sentences of imprisonment, enforceable to custodial sentences of up to 30 days, which resulted in nearly 1300 convicts leaving prisons in 2013.⁵⁷

Concerning the policy of applying conditional release in Poland (as in Lithuania and other post-Soviet countries), one notices a growing “austerity” in the policy of using this institute (limiting the conditions of application) and an increase in punitive and penal populism⁵⁸. Despite successive legislative changes in this

⁵⁵ These amnesties, in retrospect, should be evaluated as absolutely necessary, since, given Poland's geopolitical situation in those years, people who committed “politicized crimes” were sent to penitentiary institutions, propagandistically beneficial for strengthening the authority of those in power.

⁵⁶ See more: <https://sw.gov.pl/strona/statystyka-roczna> [last viewed 23.04.2025].

⁵⁷ See more: Atlas Przestępczości 6, p. 106.

⁵⁸ Penal populism on conditional release was not analysed more widely and deeply in this article. However, it should be noted that penal populism on conditional release in Poland and Lithuania most often manifests itself at the legislative level, since from time to time some members of parliament propose to tighten the conditions of conditional release, expand the circle of prisoners to whom conditional release does not apply, etc. Sometimes, the legislator (despite scientific criticism and arguments about their non-compliance with international standards) accepts such proposals. There is no doubt that the attitude of the parliament and part of the public is seen (or even feels pressure) by judges, which indirectly influences the stricter application of conditional release for convicts, especially sentenced for certain “more sensitive” crimes (e.g., sexual crimes, crimes against children, etc.). Penal populism on conditional release in Poland and Lithuania most often manifests itself at the legislative level, when some members of parliament propose to tighten the conditions of conditional release, expand the circle of prisoners to whom conditional release does not apply, etc. Sometimes, the legislator (despite scientific criticism and arguments about their non-compliance with international standards) accepts such proposals. There is no doubt that the attitude of the parliament and part of the public is seen (or even feels pressure) by judges, which indirectly influences the stricter application of conditional release for convicts, especially sentenced for certain “more sensitive” crimes (e.g., sexual crimes, crimes against children, etc.).

area, which declared respect for international recommendations, statistics show a disturbing trend in using this institute in recent years. In Poland, from year to year, the number of applications submitted for conditional release decreases, and fewer applications are granted. The percentage of conditional releases granted to the number of applications submitted in 2012 was 46.1%, in 2016 – 33.0%, and in 2019 – only 25.3%.⁵⁹ Similar to the policy of applying conditional release in Poland is the policy of granting conditional release from prisons, which are also becoming fewer yearly. According to the Bureau of Information and Statistics of the Central Board of Prison Service, the population of prisons in Poland as of 2023 is at 92.12%, but at the same time, the number of long-term prison sentences of more than 10 years and life imprisonment is increasing.⁶⁰ No change in the trends of the policy of applying conditional release may, in the not-too-distant future, restore the problem of excessive prison overcrowding.

Statistics presented in Table 2 show the number of conditional releases granted in Poland and the distribution of applications for conditional release by the institution of the application for release between 2016 and 2023. The total number of requests for conditional release has decreased from 34 692 (2016) to 25 767 (2020) and 20 299 (2023). Meanwhile, the number of conditional releases granted in Poland has also steadily decreased in recent years, for example, from 11 431 (2016) to 6158 (2020) and 5019 (2023). As mentioned earlier, the prison population in Poland has increased slightly in recent years, but it is nevertheless visible and may be significantly influenced by the tightening of the policy of granting conditional releases.

Table 2. Total number of requests, successful and unsuccessful applications for conditional release in Poland

Year	2016	2017	2018	2019	2020	2021	2022	2023
Institution								
Total requests for conditional release	34 692	31 771	30 296	28 026	25 767	23 028	22 012	20 299
Successful applications	11 431	9584	8554	7087	6158	4973	5209	5019
Director of prison	6791	5700	4680	3309	2543	1541	1609	1573
Prosecutor or court	2	1	2	2	4	1	1	4
Probation officer	7	2	8	7	9	6	6	5
Convicted person or defence counsel	4631	3881	3864	3769	3602	3425	3593	3437

⁵⁹ See more: Atlas Przestępczości 6, pp. 106, 119.

⁶⁰ See more: Atlas Przestępczości 6, p. 115.

Continuation of the Table 2

Year Institution	2016	2017	2018	2019	2020	2021	2022	2023
Unsuccessful applications	23 258	22 186	21 737	20 936	19 609	18 055	16 803	15 274
Director of prison	504	603	659	410	209	97	108	78
Prosecutor or court	0	1	0	0	1	0	1	1
Probation officer	8	6	9	11	6	4	6	2
Convicted person or defence counsel	22 746	21 576	21 069	20 517	19 393	17 954	16 688	15 193
Applications considered by the court of its own motion	3	1	5	1	0	0	0	0

Source: <https://www.sw.gov.pl/strona/Statystyka>

According to Polish law, those entitled to submit an application for conditional release are: the director of the penitentiary institution in which the inmate is detained, the prosecutor, the court, the probation officer, the convict, and his/her defence counsel. The court examines the applications with full procedural observance of the principles of judicial independence. Still, in practice, there are visible trends that a decisive influence on positive decisions on granting conditional release is the fact that applications to the court are submitted by the director of the penitentiary institution, i.e., *de facto* by prison officers working directly with the inmate, rather than by other entities entitled to submit applications. This may raise objections from a formal and procedural point of view, but let us draw attention to the fact that the most accurate opinion as regards the evaluation of the positive criminological prognosis of the convict required for conditional release is the one that can be given by those who are in the closest contact with the inmate.

Table 2 also reflects the courts' lack of activity in submitting applications for conditional release *ex officio* and the marginal activity of prosecutors, courts, and probation officers in this area. Prosecutors, courts, and probation officers (all together) have submitted a maximum of only 24 successful and unsuccessful applications for conditional release out of 30 296 applications (2018), and 20 successful and unsuccessful applications for conditional release out of a total of 28 026 (2019) and 25 167 (2020) applications. Furthermore, statistics of Table 2 shows that the majority of applications are submitted by convicted persons or their defence counsel, for example, in 2016, 29 537 applications out of 34 692, or 85.1% of all applications; in 2020, 22 995 applications out of 25 767, or 89.2% of all applications; and in 2023, 18 630 applications out of 20 299, or 91.8% of all applications.

It should be noted that the subject who submitted successful conditional release applications changed significantly between 2016 and 2023: while in 2016–2018 it was the prison director (for example, in 2016, prison directors submitted 6791 successful applications out of all 11 431 successful applications), whereas in 2020–2023, it became the convicted person or their defence counsel (for example, in 2023, they submitted 3437 successful applications out of all 5019 successful applications). However, applications submitted by directors of penitentiary institutions have resulted in negative decisions less frequently than those submitted by convicts and their defence counsels.

Finally, the number of total applications that produced negative decisions is three times greater than those which resulted in positive decisions, for example, in 2022, 5209 successful applications, that brought a positive decision, and 16 803 unsuccessful applications; in 2023, 5019 successful applications and 15 274 unsuccessful applications. The data proves that the conditional release in Poland is not applied following the European recommendations, as the last stage of serving the sentence in non-custodial conditions should be obligatory.⁶¹

There are four categories of convicts in Polish prisons: juveniles (M), first-time convicts (P), recidivists (R), and those serving military detention (W). The effectiveness of an application for conditional release depends on the category to which a given prisoner is assigned. Table 3 presents a summary of successful applications for granting conditional release, taking into account the penitentiary category to which the convict was classified.

Table 3. Total number of successful applications by the categories of convicts in Poland

Year	2016	2017	2018	2019	2020	2021	2022	2023
Applicant								
Successful applications.	M-99	M-72	M-52	M-33	M-32	M-14	M-21	M-16
In total	P-6936	P-5807	P-5096	P-4367	P-3804	P-3085	P-3246	P-3077
	R-4399	R-3706	R-3411	R-2689	R-2322	R-1874	R-1942	R-1932
	W - 0	W - 0	W-0	W - 1	W - 0	W - 0	W - 0	W - 0

By far the most frequent use of the institute of conditional release is made by first-time convicts, for example, in 2016, 6936 applications of this group of convicts were successful out of a total of 11 434 successful applications; in 2020, 3804 applications – out of 6158; and in 2023, 3077 applications – out of 5025 applications. Such a result is obvious, since they constitute the largest group among the inmates and their criminological prognosis is usually more certain than that of persons with criminal careers or juveniles. Recently, the policy of applying conditional release has been tightened towards all categories of convicts (except convicts serving military detention).

In conclusion, it can be stated that the statistics on the application of conditional release show an evident trend of tightening the policy of applying this probation measure in Poland, which only confirms the strengthening of the punitive nature

⁶¹ Recommendation Rec (2006) 2-rev on the European Prison Rules. Available: <https://search.coe.int/cm?i=09000016805df03f> [last viewed 20.04.2025].

of criminal policy. Meanwhile, in Lithuania, the application of conditional release has slightly increased in the last three years (2020–2023). However, this does not yet permit to recognize that this is already a stable (and positive) trend. Although a comparison of the application of conditional release in Poland and Lithuania shows some differences, it can hardly be admitted that both countries' practices follow international recommendations, according to which the last part of imprisonment should be served outside a prison.

Summary

In Poland and Lithuania, conditional release is described as an institute of a probationary nature, the essence of which is the performance of a specific (traditionally, the last) part of imprisonment not in a penitentiary facility, but while free in society, but with certain obligations (restrictions) and under the supervision (*inter alia*, e-monitoring) of probation services. In both countries, a discretionary conditional release model is applied, according to which the convict must serve a specific part of the imposed imprisonment (formal ground), and the prediction of their behaviour that allows for the conclusion that the person shall not commit a new crime in the future (substantive ground). In Poland, a more exhaustive list of categories of specific parts of imposed imprisonment to be served to apply the conditional release is provided, and these terms are longer than those provided in Lithuania.

The substantive grounds for conditional release are practically identical in Poland and Lithuania. It consists of an assessment of the convicted individual's personality and behaviour, leading to the conclusion that the person shall fulfil imposed obligations (restrictions) during the probationary period and will not commit a new crime again. In Lithuania, the determination of the substantive ground for conditional release is based on a more formalised criminal behaviour risk assessment and a conclusion prepared by the imprisonment facility, whilst in Poland criminal courts have the discretion to set stricter formal restrictions to apply for conditional release, which is impossible in Lithuania. In the court practice of both countries, the decision on conditional release in some instances is determined not by the overall assessment of the convict, but by individual aspects of the assessment. In both countries, the law provides for specific groups of prisoners excluded from the conditional release application, which is criticized in both states' doctrine.

The statistics on the application of conditional release show an evident trend of tightening the policy of applying this probation measure in Poland, which only confirms the strengthening of the punitive nature of criminal policy. Meanwhile, in Lithuania, the application of conditional release has slightly increased in the last three years (2020–2023). However, this does not yet permit to recognize that this is already a stable (and positive) trend. Furthermore, the application of conditional release in Poland and Lithuania cannot be assessed as follows international recommendations, according to which the last part of imprisonment should be served outside a prison. Taking into account this, it is worth considering whether applying a mandatory conditional release model for specific categories of convicts should be foreseen in Poland, and extended in Lithuania, which would create legal prerequisites for a wider application of conditional release.

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<https://doi.org/10.22364/jull.19.03>

Integrating Ethical Principles and Human Rights Based Approach in the EU Artificial Intelligence Act and the Council of Europe Convention on Artificial Intelligence: Interplay of Ethics and Law in the AI Regulation Debate

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The current article is dedicated to the analysis of the ways how ethical principles have been translated into European artificial intelligence (AI) regulation. The authors explore their role in the implementation and enforcement of the AI regulation. By integrating diverse methods acquired from humanities, legal sciences, and philosophy, the current study strives to gain profound insights into the challenges and different approaches of regulating AI. First, the authors explore the interplay of law and ethics in the AI debate, describing it as a binary approach. They argue that ethical principles, if perceived as a moral philosophy deeply rooted in foundational values (so-called multi-dimensional approach), can provide valuable guidance in implementation of AI regulation. Further, the authors analyse the ways how ethical principles have been taken up by the EU Artificial Intelligence Act (AI Act) and the Council of Europe's Framework Convention on Artificial Intelligence and Human Rights, Democracy and the Rule of Law (Convention on AI or Convention). It focuses on the trade-offs made in this process, different approaches taken by the EU and the CoE to regulate AI and critically reflects current challenges in this process. The AI Act applies a risk-based approach that requires balancing various ethical principles, fundamental rights, values and interests, e.g. the development and uptake of AI. In turn, the CoE's Convention on AI adopts a rights-based approach that has the potential to make a substantial difference by ensuring that AI systems are developed and used during their entire lifecycle in ways that protect fundamental rights, the rule of law, democracy, and social well-being. The article demonstrates how ethical principles and human rights-based approach can guide the development and implementation of the AI regulatory framework.

Keywords: Artificial Intelligence Act, Convention on Artificial Intelligence, AI ethical principles, AI ethics, human rights-based approach to AI, risk-based approach to AI.

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Introduction

The European Union (EU) Artificial Intelligence Act (Regulation 2024/1689)¹ (AI Act) and the Council of Europe's (CoE) Framework Convention on Artificial

¹ 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); OJ L, 2024/1689, 12.7.2024. Available: <http://data.europa.eu/eli/reg/2024/1689/oj> [last viewed 14.06.2025].

Intelligence and Human Rights, Democracy, and the Rule of Law² (Convention on AI) represent the most significant legal milestones of artificial intelligence (AI) regulation in Europe, but also beyond.

On 13 March 2024, the European Parliament adopted the AI Act, the first comprehensive AI legal framework in the world. It is an ambitious attempt to balance both the benefits and risks of AI systems and to support the EU objective to be a global leader in the development of human-centric and trustworthy AI. The AI Act will be fully applicable two years after its entry into force, although there are a number of exceptions. For example, provisions on prohibited AI practices apply from 2 February 2025.

On 17 May 2024, the CoE Committee of Ministers adopted the Convention on AI, the first international legally binding treaty on AI. The Convention on AI extends beyond Europe, as it is open for non-European countries to join. On 5 September 2024, the Convention on AI was opened for signature and was signed by the EU, the United States, the United Kingdom, Norway and several other states. The European Commission signed the Convention on AI on behalf of the EU.

AI was initially governed by ethical codes and guidelines, which were only later followed by legal regulations. In the last decade, international organizations have developed ethical guidelines defining the values and principles for development and use of AI systems, while acknowledging the necessity to adopt legally binding regulation and effective implementation measures.³ There has been broad research analysing and comparing the ethical principles included in the AI guidelines.⁴ However, their integration and role in the enforcement of the European AI regulation has not yet been sufficiently examined.

The aim of the current article is to explore how ethical principles have been translated into legally binding AI regulation and their role in the implementation and enforcement of the European AI regulatory framework in the future. The AI Act and the Convention on AI have been selected as case studies to understand the potential and limitations of AI ethical principles given the paramount importance of these two legally binding instruments. By integrating diverse methods acquired from humanities, legal sciences, and philosophy, the authors strive to gain profound insights into different approaches taken by the EU and the CoE to regulate AI, and the challenges encountered in this process.

First, the authors explore the binary interplay of ethics and law in the AI debate. The evaluation is based on the distinction between ethics and morality thus providing guidance on how to understand recent regulatory efforts in Europe. The advantages

² Council of Europe. Council of Europe Framework Convention on Artificial Intelligence and Human Rights, Democracy, and the Rule of Law. 2024. Available: <https://rm.coe.int/1680afae3c> [last viewed 14.06.2025].

³ UNESCO. Recommendation on the Ethics of Artificial Intelligence. 2021. Available: <https://unesdoc.unesco.org/ark:/48223/pf0000380455>; OECD. Recommendation of the Council on Artificial Intelligence, 2019. Available: <https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0449> [last viewed 14.06.2025]; Council of Europe. Recommendation CM/Rec(2020)1 of the Committee of Ministers to Member States on the human rights impacts of algorithmic systems, 2020. Available: <https://search.coe.int/cm/?i=09000016809e1154> [last viewed 14.06.2025].

⁴ Jobin, A., Ienca, M., Vayena, E. The global landscape of AI ethics guidelines. *Nature Machine Intelligence*, 1, 2019, 389–399. <https://doi.org/10.1038/s42256-019-0088-2>; Fjeld, J., Achten, N., Hilligoss, H., Nagy, A., Srikumar, M. Principled Artificial Intelligence: Mapping Consensus in Ethical and Rights-Based Approaches to Principles for AI. Berkman Klein Center Research for Internet & Society, 2020. Available: https://dash.harvard.edu/bitstream/handle/1/42160420/HLS%20White%20Paper%20Final_v3.pdf?sequence=1&isAllowed=y [last viewed 14.06.2025].

and disadvantages of both ethical and legal governance are presented. The authors of the current article underscore that a multi-dimensional and universal understanding of ethics may be essential for developing human rights-based AI regulation and implementation measures for trustworthy AI.

Further, the authors offer an analysis as to how ethical principles have been taken up by the European AI regulation. Namely, the second section is dedicated to the analysis of the AI Act, but the third section – the Convention on AI. Both sections, first of all, provide a brief overview of the legal framework and then review different approaches (i.e., risk-based and rights-based approaches) that have been applied, explore the role of ethical principles and the trade-offs, which the regulations involve, critically reflecting on the challenges to be overcome in the establishment of AI regulatory framework.

1. Ethics and AI

1.1. Interplay of law, ethics, and human rights in the AI debate

The relationship between law and ethics has long been a subject of inquiry – from ancient philosophical debates to modern legal theory and philosophy. Traditional discussions, such as those between natural law proponents and legal positivists, have sought to determine whether legal systems are grounded in universal ethical principles or operate autonomously with socially contingent moral norms.⁵ For instance, Radbruch famously argued that severe immorality within the law undermines its legitimacy.⁶

In today's context of AI governance, ethical guidelines and legal frameworks increasingly operate side by side, aiming to ensure that AI is developed and used responsibly. Ethical guidelines offer flexibility and adaptability to cultural, technological, or situational nuances. However, they often lack effective enforcement mechanisms, especially when influential private actors are involved. However, compared to hard laws, ethical frameworks offer advantages such as flexibility and adaptability to culture, place, and time.⁷ While law, compared to ethics, is inherently more enforceable, prioritising or glorifying legal regulation alone can lead to unintended consequences. Legal regulation is heavily impacted by specific societal, cultural, economic and political contingencies, and is therefore clear at the abstract level only.

However, AI regulation cannot be based solely on AI ethical principles. Methods and tools must be identified to put ethical values and principles into practice. In this regard, legal requirements play a crucial role. It is necessary to define a set of harmonized rules that constitute the minimum requirements to be met in order for AI systems to be recognized as ethical and legitimate. Human rights lie at the heart

⁵ Fuller, L. L. *The Morality of Law*. Yale University Press, 1969; Hart, H. L. A. *Law, Liberty, and Morality*. Stanford University Press, 1963; Shapiro, S. J. *The Hart-Dworkin Debate: A Short Guide for the Perplexed*. 2007. <http://dx.doi.org/10.2139/ssrn.968657>; Alexy, R. *The Argument from Injustice*. Oxford: Clarendon Press, 2002.

⁶ Radbruch, G. *Gesetzliches Unrecht und übergesetzliches Recht* [Statutory injustice and extra-statutory law]. *Süddeutsche Juristen-Zeitung*, 1(5), 1946, pp. 105–108.

⁷ Awad, E., Dsouza, S., Kim, R., Schulz, J., Henrich, J., Shariff, A., Bonnefon, J.-F., Rahwan, I. *The Moral Machine Experiment*. *Nature*, 563, 2018, pp. 59–64. Available: <https://doi.org/10.1038/541586-018-0637-6> [last viewed 14.06.2025].

of ethical principles, and respect for them in the context of democracy and the rule of law is the most secure way of defining abstract ethical principles and values.

The emerging AI-driven society presents various potential impacts on individual and collective rights and freedoms, underscoring the enduring importance of legal instruments, which cannot be supplanted by ethical guidelines.⁸ In particular, ethics and international human rights law share numerous similarities, and international human rights law has a rich ethical core.⁹ Human rights are legally enforceable rights. Furthermore, they form part of the ethical AI, as they are also bestowed on individuals by mere virtue of their status as human beings regardless of any legal enforceability.¹⁰ Human rights-based approach to AI is underscored in numerous AI ethical guidelines¹¹, contributions by academy, public administrations and companies.¹²

1.2. Ethics v. morality

A critical shortcoming in the current debate on law and ethics is that ethics is seldom understood for what it truly is – namely, an effort to construct universal, rational standards – rather than simply being a label for entrenched moral norms. A clear distinction between ethics and morality is essential for understanding both the ethical challenges posed by AI systems and the development of regulatory frameworks that govern them.

Unlike morality, which refers to the largely unwritten, culturally and historically contingent set of norms that govern behaviour within communities over specific time periods, ethics is a philosophical discipline built around the moral reflection of the question “What should I do?” In other words, ethical reflection is not about identifying and justifying what is acceptable and desirable in each society, but about reflecting on such rules and prohibitions and attempting to construct general, universally valid and unchanging standards.¹³ What distinguishes morality from ethics is its dogmatic, unreflective and uncritical dimension, demanding obedience from the subject and discouraging critical reflection on morality.¹⁴

Thus, if we understand ethics as an attempt to construct universal rules of appropriate conduct, starting with established normative theories – utilitarianism, deontology, virtue ethics and human rights ethics – we would have serious candidates for a principled and non-arbitrary analysis of the implications of AI. By considering these theories, we can strive for a principled and non-arbitrary approach to understanding what constitutes the right behaviour in developing and deploying AI technologies. Each of these ethical theories offers valuable perspectives on issues such as privacy, fairness, accountability, and the AI’s broader social impact, allowing for

⁸ Mantelero, A. The Fundamental Rights Impact Assessment (FRIA) in the AI Act: Roots, legal obligations and key elements for a model template. *Computer Law & Security Review*, 54, 2024. <https://doi.org/10.1016/j.clsr.2024.106020>

⁹ Monteiro, A. R. *Ethics of Human Rights*. Springer, 2014.

¹⁰ Smuha, N. A. From a ‘race to AI’ to a ‘race to AI regulation’: regulatory competition for artificial intelligence. *Law, Innovation and Technology*, 13(1), 2021, pp. 57–84. <https://doi.org/10.1080/17579961.2021.1898300>

¹¹ UNESCO. Recommendation on the Ethics of Artificial Intelligence. 2021. Available: <https://unesdoc.unesco.org/ark:/48223/pf0000380455> [last viewed 14.06.2025].

¹² Baldassarre, M. T., Caivano, D., Nieto, B. F., Gigante, D., Ragone A. Fostering Human Rights in Responsible AI: A Systematic Review for Best Practices in Industry. *IEEE Transactions on Artificial Intelligence*, 6(2), pp. 416–431, Feb. 2025. <https://doi.org/10.1109/TAI.2024.3394389>

¹³ Habermas, J. *Moral Consciousness and Communicative Action*. MIT Press, 1990.

¹⁴ Gert, B. *Common Morality: Deciding What to Do*. Oxford University Press, 2004.

a comprehensive examination of ethical considerations. Ethical reflection presupposes a confrontation and interrelation of established normative theories. In light of these observations, we argue for a “deep ethics” approach – one that moves beyond the simplistic binary of ethics versus law – to develop robust, universally applicable normative standards. Such an approach would better support the enforcement, implementation, and interpretation of AI regulation in an increasingly complex ethical landscape.¹⁵

The next two sections will reveal the integration of ethical principles both in the AI Act and the Convention of AI.

2. The EU Artificial Intelligence Act

2.1. A brief overview of the AI Act and the risk-based approach

The AI Act aims to pursue two parallel distinct objectives, although emphasising their compatibility. On the one hand, the AI Act aims to improve the functioning of the internal market and promote the uptake of human-centric and trustworthy AI, and to support innovation. On the other hand, it aims to ensure a high level of protection of health, safety, fundamental rights enshrined in the Charter, including democracy, the rule of law and environmental protection, against the harmful effects of AI systems in the EU (Article 1(1)).

The AI Act is grounded in fundamental rights laid down in the EU Charter of Fundamental Rights. According to the AI Act, it is vital for AI and its regulatory framework to be developed in accordance with EU values, the fundamental rights and freedoms recognised in the Charter of Fundamental Rights of the European Union (Charter) (Recital 6).

The AI Act envisage different groups of risks: individual risks, incurred by each of us individually, essentially the restrictions on fundamental rights and individual freedoms; collective risks that affect groups of individuals; and risks that deeply affect the fundamentals of our society and democracy, such as caused by manipulative practices of online platforms and general purpose AI models.¹⁶

Considering all these risks, the AI Act follows a risk-based approach and classifies AI systems based on different risk levels they create: unacceptable, high, systemic, limited, and minimal risk. Unacceptable risk refers to eight particularly harmful AI practices that violate fundamental rights and EU values and are therefore prohibited. AI systems that create an adverse impact on safety or fundamental rights are considered as high-risk. This includes AI systems that are product or safety components (Article 6(1)) or systems used in the areas listed in Annex III of the draft AI Act (Article 6(2)), including such areas as biometric identification, education, employment, law enforcement, migration, asylum and border control. The AI Act establishes specific requirements for high-risk AI systems, linked to the obligations

¹⁵ *Mittelstadt, B.* Principles alone cannot guarantee ethical AI. *Nature Machine Intelligence*, 1, 2019, pp. 501–507.

¹⁶ *Poulet, Y., Bontridder, N.* Governing AI – the EU approach. Contribution presented at the international conference on Emerging Technologies and Changing Dynamics of Information [ETCDI], 2021. Available: https://www.researchgate.net/publication/384691518_Governing_AI_-The_EU_approach_Contribution_presented_at_the_international_conference_on_Emerging_Technologies_and_Changing_Dynamics_of_Information_ETCDI [last viewed 14.06.2025].

of providers, deployers, and other involved parties.¹⁷ For certain AI systems, specific transparency requirements are imposed. In addition, the AI Act considers systemic risks that could arise from general-purpose AI models (Article 3(65)).

The AI Act aims to introduce a balanced and proportionate horizontal regulatory approach with a view to achieving its main objectives to address both the benefits and risks of AI systems through applying risk-based approach, which has also required various trade-offs between ethical principles, fundamental rights, values and interests which will be discussed further.

2.2. Ethical principles and trade-offs in the AI Act and the need to move towards rights-based approach

The AI Act acknowledges the importance of ethical principles by referring to the Ethics guidelines for trustworthy AI (Guidelines) adopted by the High-Level Expert Group on Artificial Intelligence (AI HLEG).¹⁸ At the last phase of the negotiation process, two referrals to the Guidelines were introduced in the Preamble of the AI Act to address the concerns expressed by many NGOs and academics that the AI Act relies too much on the risk-based approach, while a greater focus should be directed at the rights-based approach.

Firstly, the AI Act emphasises that to ensure a consistent and robust level of protection for public interests concerning health, safety, and fundamental rights, common rules for high-risk AI systems should be established. These rules should align with the Charter, be non-discriminatory, and comply with the EU's international trade commitments. They should also take into account the European Declaration on Digital Rights and Principles for the Digital Decade, as well as relevant Guidelines (Recital 7). The AI Act also emphasises that it is grounded in fundamental rights, which is reflected in the classification criteria of the AI systems, in particular regarding prohibitions and high-risk AI systems (Recital 48).

Besides the paramount importance of fundamental rights, the AI Act also acknowledges that while the risk-based approach is the basis for a proportionate and effective set of binding rules, it is important to recall the Guidelines developed by the independent AI HLEG.¹⁹ In the Guidelines, the AI HLEG developed seven non-binding ethical principles for AI, which are intended to help ensure that AI is trustworthy and ethically sound. The seven principles include human agency and oversight; technical robustness and safety; privacy and data governance; transparency; diversity, non-discrimination and fairness; societal and environmental well-being and accountability. Without prejudice to the legally binding requirements of the AI and any other applicable EU law, those Guidelines contribute to the design of a coherent, trustworthy and human-centric AI, in line with the Charter and with the values on which the EU is founded (Recital 27). The AI Act also briefly explains each of the seven principles as defined in the Guidelines.

By outlining these principles in the preamble, the AI Act appears to address the absence of overarching principles within its framework. The AI Act does not

¹⁷ Most of the requirements will apply to providers (developers) of AI systems which must implement a risk management system, use high-quality data sets, draw up technical documentation, enable record-keeping, ensure transparency and provide information to users, ensure human oversight and an appropriate level of robustness, accuracy and cybersecurity (Articles 8–15, AI Act).

¹⁸ AI HLEG. Ethics Guidelines for Trustworthy AI, 2019. Available: <https://ec.europa.eu/digital-single-market/en/news/ethics-guidelines-trustworthy-ai> [last viewed 14.06.2025].

¹⁹ Ibid.

define such general principles, in contrast to, e.g., the General Data Protection Regulation²⁰ (GDPR) or Convention on AI, which will be discussed further.

The AI Act also points out that the application of those principles should be translated, when possible, in the design and use of AI models. They should serve as a basis for the drafting of codes of conduct. All stakeholders, including industry, academia, civil society and standardisation organisations, are encouraged to take into account the ethical principles for the development of voluntary best practices and standards (Recital 27).

The AI Act acknowledges that the EU law on the protection of personal data, privacy and the confidentiality of communications applies to personal data processed in connection to AI systems (Article 2(7)). Inclusion of this provision aims to ensure that the AI Act would not lead to weakening of the EU's high personal data protection standards.

According to the AI Act, transparency is one of the key requirements which applies to both high-risk and to certain limited risk AI systems, which intend to interact with natural persons or generate content with risks of impersonation or deception. In certain circumstances, the use of these systems should therefore be subject to specific transparency obligations. In particular, individuals should be notified that they are interacting with an AI system (Recital 132).

The AI Act also sets requirements to ensure diversity, non-discrimination and fairness of AI systems to ensure that AI systems are developed and used in a way that includes diverse actors and promotes equal access, gender equality and cultural diversity, while avoiding discriminatory impacts and unfair biases that are prohibited by EU or national law (Recital 27).

The AI Act acknowledges that development and use of AI systems may involve various trade-offs and conflicts between ethical principles, fundamental rights and other values and interests, and between implementation of the legally binding requirements and ensuring the competitiveness of the AI industry and innovation in Europe.

The AI Act recognizes that different public interests can exceptionally permit to deviate from the mandatory requirements set for high-risk AI systems. For example, according to the AI Act,

[u]nder certain conditions, rapid availability of innovative technologies may be crucial for health and safety of persons, the protection of the environment and climate change and for society as a whole. It is thus appropriate that under exceptional reasons of public security or protection of life and health of natural persons, environmental protection and the protection of key industrial and infrastructural assets, market surveillance authorities could authorise the placing on the market or the putting into service of AI systems which have not undergone a conformity assessment (Recital 130).

These considerations are set down in the Article 46 of the AI Act “Derogation from conformity assessment procedure”, allowing for exceptions to the usual approval process for high-risk AI systems based on the aforementioned public interests.

²⁰ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), OJ L 119, 4.5.2016. Available: <http://data.europa.eu/eli/reg/2016/679/oj> [last viewed 14.06.2025].

Besides protective requirements, the AI Act introduces a number of measures to support AI innovation. The AI Act envisages setting up AI regulatory sandboxes (Articles 57–59) and real-world testing (Article 60), which provide a controlled environment to test innovative technologies for a limited time, thereby fostering innovation in AI by companies, SMEs and start-ups across the EU.

The AI Act involves conflicts between fundamental rights, such as the right to privacy and data protection, and the interests of public and national security. The AI Act does not apply to the AI systems used for national security purposes (Article 2(3)). The long existing and widely disputed tension between protecting personal data and privacy and protecting national security through law enforcement and surveillance is well evident in the AI Act regarding prohibited AI practices.²¹ The AI Act prohibits the use of ‘real-time’ remote biometric identification systems in publicly accessible spaces for the purposes of law enforcement; however, it also provides an exhaustive list of exceptional cases, in which the prohibition does not apply (Article 5(1)h). These rules have been one of the critical contention points during the negotiation process of the AI Act. A number of civil society organisations have expressed regret that the AI Act fails to properly ban some of the most dangerous uses of AI, including systems that enable biometric mass surveillance and predictive policing systems.²²

The AI Act also contains trade-offs between transparency and law enforcement interests. Regarding the transparency obligation of certain AI systems intended to interact with natural persons or to generate content, the AI Act acknowledges that in certain circumstances the use of those systems should be subject to specific transparency obligations subject to targeted exceptions to take into account the special need of law enforcement (Recital 132). Transparency obligations for providers and deployers of certain AI systems shall not apply to AI systems authorised by law to detect, prevent, investigate or prosecute criminal offences (which are in the domain of public sector), unless those systems are available for the public to report a criminal offence (Article 50(1)). Likewise, the AI Act involves trade-offs between transparency and other rights, i.e. the right to freedom of expression and the right to freedom of the arts and sciences (Recital 134).

It is of utmost importance to implement the AI Act by carefully observing ethical principles and fundamental rights. Fundamental rights impact assessment is one of the main mechanisms through which rights-based approach could be applied in practice.²³ The aim of the fundamental rights impact assessment is for the deployer to identify the specific risks to the rights of individuals or groups of individuals likely to be affected and measures to be taken in the case of materialisation of those risks. Taken that certain risks to fundamental rights can only be fully identified knowing the context of use of the high-risk AI system, in order to efficiently ensure that fundamental rights are protected, deployers of high-risk AI systems that are bodies governed by public law, or private entities providing public services and deployers of certain high-risk AI systems listed in an Annex III of the AI Act, such as banking or insurance entities, should carry out a fundamental rights impact assessment prior to putting it into use (Article 27).

²¹ Dimitrova, A., Brkan, M. Balancing National Security and Data Protection: The Role of EU and US Policy-Makers and Courts before and after the NSA Affair. *JCMS Journal of Common Market Studies*, 56(4), 2018, pp. 751–767. <https://doi.org/10.1111/jcms.12634>

²² Access Now. The EU AI Act: a failure for human rights, a victory for industry and law enforcement, 2024. Available: <https://www.accessnow.org/press-release/ai-act-failure-for-human-rights-victory-for-industry-and-law-enforcement/> [last viewed 14.06.2025].

²³ Mantelero, A. The Fundamental Rights Impact Assessment.

Although the AI Act applies risk-based approach, ethical principles and human rights-based approach are of particular interest in the implementation of EU AI Act and resolving various trade-offs between different principles, rights, values and interests it contains. Human rights-based approach will help adapt and overcome the limitations of AI regulation to facilitate its implementation in real-world and trustworthy AI advancement.²⁴ The next section will further reveal that the Convention of AI has taken a different approach in this regard, by applying a rights-based approach.

3. The Council of Europe Convention on Artificial Intelligence

3.1. A brief overview of key features

The CoE's Convention on AI presents the first-ever international legally binding treaty aimed at ensuring the respect of human rights, democracy, and the rule of law. Its scope applies both to public authorities and the private actors (Article 3(1)).²⁵

The European Union (EU) played a significant role in shaping the content of the Convention on AI attempting to align it with existing EU legislation, including the EU AI Act (see chapter 3). The Convention on AI is open not only to the CoE member states to join, but also seeks to attract global participation of other states outside Europe that share the values of human rights, democracy, and the rule of law.²⁶ Notably, however, the Convention on AI does not cover the use of AI for national defence or national security purposes, for which the CoE does not have a mandate as noted explicitly in Article 3(4) of the Convention on AI.²⁷

The Convention on AI aims to promote the responsible design, development, and deployment of AI systems to prevent harms and protect individuals and societies against possible negative consequences.²⁸ For this purpose, the Convention on AI emphasises several key principles, namely, human dignity and individual autonomy, transparency and oversight, accountability and responsibility, equality and non-discrimination, privacy and data protection, reliability and safe innovation to ensure that AI systems do not undermine democratic processes, the rule of law or endanger individual human rights. It covers the entire lifecycle of AI systems, from design and development to deployment and use, requiring developers and users of AI to adhere to ethical standards and legal requirements that protect fundamental rights.

To ensure effective implementation and compliance, the Convention on AI mandates public reporting, regular audits, impact assessments, the establishment of

²⁴ Prabhakaran, V., Mitchell, M., Gebru, T., Gabriel, I. A Human Rights-Based Approach to Responsible AI. arXiv, 2022. <https://doi.org/10.48550/arXiv.2210.02667>; Hogan, L., Lasek-Markey, M. Towards a Human Rights-Based Approach to Ethical AI Governance in Europe. *Philosophies*, 9(6), 2024, p. 181. <https://doi.org/10.3390/philosophies9060181>.

²⁵ The Convention on AI applies to public authorities and the private actors acting on their behalf; however, regarding private actors, the Parties may opt to be directly obliged by the relevant provisions of the Convention on AI or, as an alternative, take other measures to comply with these provisions while fully respecting their international obligations regarding human rights, democracy and the rule of law (Article 3(1)).

²⁶ Council of Europe. Council of Europe adopts first international treaty on artificial intelligence, 17 May 2024. Available: <https://www.coe.int/en/web/portal/-/council-of-europe-adopts-first-international-treaty-on-artificial-intelligence> [last viewed 14.06.2025].

²⁷ Müller, A. Council of Europe creates rules for Artificial Intelligence. *Algorithm Watch*, 2024.

²⁸ Council of Europe. Council of Europe Framework Convention on Artificial Intelligence and Human Rights, Democracy, and the Rule of Law. 2024. Available: <https://rm.coe.int/1680afae3c> [last viewed 14.06.2025].

independent review bodies, and redress mechanisms for individuals adversely affected by AI systems. Furthermore, the Convention provides practical tools for facilitating implementation in its member states: guidelines for best practices, templates for impact assessments, and frameworks for establishing oversight bodies, which can help states ensure that AI systems are used responsibly and ethically. AI systems must undergo rigorous impact assessments to identify and mitigate any risks to human rights, the rule of law, and democratic processes. Additionally, mechanisms for redress and accountability are mandated to ensure that individuals can seek recourse if adversely affected by AI systems.²⁹

The drafting of the Convention involved extensive negotiations facilitated by the Committee on Artificial Intelligence (CAI). Through multiple readings of the draft text and consultations with CAI members, observers, and civil society organizations, the process aimed to create a balanced and effective framework that addresses diverse perspectives and concerns related to AI.³⁰ A main challenge was presented by the Convention's aspiration to be both global and effective in protecting human rights, rule of law, and democracy. The implicit trade-off between flexibility which was necessary to allow for widespread adoption and effectiveness in implementation – especially regarding protection of human rights – was not easy to solve. Implementing a global framework for AI governance in diverse legal and cultural contexts presents significant challenges. The Convention on AI must be sufficiently adaptable to accommodate varying national and regional circumstances while ensuring a consistent application of its core principles. This adaptability is crucial for its acceptance and effectiveness across a broad spectrum of states. The Convention therefore allows for different implementation strategies, enabling states to align their AI regulations with existing national laws and practices while adhering to the Convention's overarching goals.³¹ However, this flexibility also raises concerns about the potential for uneven implementation. In some contexts, national interests, different political practices, or cultural norms might lead to interpretations of the Convention that weaken its protective measures, especially regarding human rights. To mitigate this risk, the Convention includes mechanisms for international cooperation and monitoring, ensuring that states remain accountable, and that best practices are shared and adopted widely.³²

3.2. Ethical principles, trade-offs and the rights-based approach

The ethical principles enshrined in the Convention on AI are built on the CoE's longstanding commitment to human rights, democracy, and the rule of law, as outlined in foundational documents and its mandate. The CoE has a strong history of promoting human rights, exemplified by documents like the European Convention on Human Rights and the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data. These principles also align with ethical

²⁹ Council of Europe. Council of Europe Framework Convention on Artificial Intelligence and Human Rights, Democracy, and the Rule of Law. 2024. Available: <https://rm.coe.int/1680afae3c> [last viewed 14.06.2025].

³⁰ Council of Europe. Council of Europe adopts first international treaty on artificial intelligence, 17 May 2024. Available: <https://www.coe.int/en/web/portal/-/council-of-europe-adopts-first-international-treaty-on-artificial-intelligence> [last viewed 14.06.2025].

³¹ Ibid.

³² European Union External Action Service (EEAS). Text of first legally binding global instrument to address risks posed by artificial intelligence finalized by the Council of Europe, 2024. Available: https://www.eeas.europa.eu/delegations/council-europe/text-first-legally-binding-global-instrument-address-risks-posed-artificial-intelligence-finalised_en [last viewed 14.06.2025].

frameworks established by other international bodies, such as the UNESCO Recommendation on the Ethics of Artificial Intelligence (Recommendation on the Ethics of AI) which emphasises human dignity, non-discrimination, and inclusiveness.³³

The CoE Convention on AI adopts a rights-based approach. Human rights are a core ethical point of reference of the Convention, mandating that AI systems be developed and used in ways that protect individual rights. This includes the right to privacy, non-discrimination, freedom of expression, and access to information. The Convention explicitly prohibits AI systems from infringing upon these rights or perpetuating and exacerbating existing inequalities.³⁴ Similarly, the Convention applies a human-centred approach to AI, prioritizing the well-being of individuals and communities, ensuring that AI systems are designed and implemented with the primary goal of enhancing human welfare. The Convention calls for accessible and inclusive AI technologies that benefit all, particularly marginalized and vulnerable groups. Furthermore, it emphasises democratic governance, the rule of law, and public participation in AI governance, fostering transparency and accountability, and ensuring that citizens have a say in how AI technologies are developed and deployed.³⁵

The Convention's prohibition of discrimination demands AI algorithms to be free from biases potentially leading to unequal treatment based on race, gender, socioeconomic status, or other protected characteristics. AI operators must therefore conduct regular audits and impact assessments to identify and mitigate any discriminatory practices. The protection of personal data is also paramount. The Convention requires that AI systems handling sensitive personal information adhere to stringent data protection standards. This includes implementing robust security measures to prevent data breaches and ensuring that data is collected, stored, and processed in compliance with applicable data protection laws. AI systems must be reliable and safe. The Convention stipulates that these systems undergo rigorous testing and validation to ensure their accuracy and robustness, particularly in sensitive areas such as healthcare and law enforcement, where human or technical errors can have severe consequences.

Proponents argue that responsible AI development, guided by clear ethical principles and legal standards, will ultimately foster a more sustainable and trustworthy innovation ecosystem. They contend that regulations can drive innovation by setting high standards for safety, reliability, and fairness, which can differentiate compliant AI systems in a competitive market. Critics, however, warn that excessive regulation could hinder technological progress, particularly for smaller companies and start-ups unable to meet stringent requirements. They assert that a more flexible approach, with phased implementation and support for compliance, could better balance the need for regulation with the imperative to foster innovation.

³³ UNESCO. Recommendation on the Ethics of Artificial Intelligence. 2021. Available: <https://unesdoc.unesco.org/ark:/48223/pf0000380455> [last viewed 14.06.2025].

³⁴ Statewatch. Council of Europe Convention on Artificial Intelligence: zero draft and member state submissions, 2023. Available: <https://www.statewatch.org/news/2023/january/council-of-europe-convention-on-artificial-intelligence-zero-draft-and-member-state-submissions/> [last viewed 14.06.2025].

³⁵ European Union External Action Service (EEAS). Text of first legally binding global instrument to address risks posed by artificial intelligence finalized by the Council of Europe, 2024. Available: https://www.eeas.europa.eu/delegations/council-europe/text-first-legally-binding-global-instrument-address-risks-posed-artificial-intelligence-finalised_en [last viewed 14.06.2025].

The Convention on AI aligns closely with other international frameworks like UNESCO Recommendation on the Ethics of AI and the EU AI Act. This alignment with international norms helps harmonize AI regulations across borders, facilitating global cooperation and consistency in AI governance. What sets the Convention on AI apart is its strong emphasis on human rights and its comprehensive approach to AI governance, covering the entire lifecycle of AI systems from design to decommissioning. This lifecycle approach ensures that AI governance is not just reactive but proactive, addressing potential risks at every stage of AI development and use. This approach not only aims to safeguard against potential harms but also promotes the development of AI technologies in line with ethical principles such as human rights (*ethics by design*).

By explicitly addressing potential risks of AI to fundamental rights through a rights-based approach, the Convention prioritizes principles such as non-discrimination, privacy and transparency. Its framework includes robust systems for redress mitigating risks such as bias and discrimination, by embedding ethical considerations into the design and deployment of AI systems

Moreover, the Convention provides practical tools and mechanisms for member states to implement its principles effectively. This includes guidelines for best practices, impact assessment templates, and frameworks for establishing oversight bodies. These resources help bridge the gap between theoretical ethical standards and real-world application, making it easier for states to integrate the Convention into their existing legal and regulatory frameworks.³⁶ The practical nature of these tools ensures that the Convention's principles are not just aspirational but actionable and enforceable.

The Convention acknowledges risk and impact management requirements, namely, carry out risk and impact assessments in respect of actual and potential impacts on human rights, democracy and the rule of law, in an iterative manner, as well as establish sufficient prevention and mitigation measures as a result of the implementation of these assessments (Article 16). These requirements align with the AI Act which introduces a particular mechanism, namely, fundamental rights impact assessment.

Despite its strengths, the Convention on AI has certain weaknesses and gaps. One notable concern is the trade-off between flexibility and effectiveness in implementation it contains, which, while allowing for diverse implementation strategies, might lead to inconsistencies in application across different jurisdictions. For example, unlike the AI Act, which introduces a wide list of prohibitions, the Convention on AI recognizes only possibility for the authorities to introduce a ban or moratoria on certain applications of AI systems ("red lines"). This could result in a patchwork of standards that vary significantly, potentially weakening the overall protective measures.³⁷ At worst, such variability can undermine the effectiveness of the Convention, creating loopholes and disparities in AI governance.

In practice, the Convention on AI may fall short in areas where national interests, political practices, or cultural norms conflict with its principles. For example,

³⁶ European Union External Action Service (EEAS). Text of first legally binding global instrument to address risks posed by artificial intelligence finalized by the Council of Europe, 2024. Available: https://www.eeas.europa.eu/delegations/council-europe/text-first-legally-binding-global-instrument-address-risks-posed-artificial-intelligence-finalised_en [last viewed 14.06.2025].

³⁷ Statewatch. Council of Europe Convention on Artificial Intelligence: zero draft and member state submissions, 2023. Available: <https://www.statewatch.org/news/2023/january/council-of-europe-convention-on-artificial-intelligence-zero-draft-and-member-state-submissions/> [last viewed 14.06.2025].

countries with weaker data protection laws or limited resources might struggle to meet the Convention's robust privacy requirements, particularly in developing countries where infrastructure and expertise are lacking, tailored support and capacity-building are necessary to ensure equitable implementation.

Lessons learned from other frameworks, such as the GDPR in the EU, highlight the importance of clear and enforceable guidelines. The GDPR's success underscores the value of having robust enforcement mechanisms and clear, actionable requirements for compliance. The Convention could benefit from adopting more specific guidelines and enforcement mechanisms similar to those in the GDPR, ensuring consistent application and compliance across different jurisdictions.

Despite the Convention's strong commitment to a multi-stakeholder approach, involving governments, civil society organizations, businesses, academia, and international bodies, concerns were raised that civil society organizations could only participate as observers and sometimes were even excluded from certain critical discussions.³⁸ Meanwhile, civil society plays a crucial role in advocating for robust human rights protections and holding governments accountable. Ensuring that the voices of civil society and marginalized communities are heard in these discussions is crucial for maintaining the integrity of the Convention in the implementation process.³⁹

Power dynamics among stakeholders present another challenge, particularly regarding powerful private tech companies who often engage in lobby activities and try to influence the regulatory process which can lead to compromises that weaken the protective measures intended to safeguard citizens' rights and liberties. This is important both to private and public sector, such as law enforcement (surveillance, predictive policing), public health, the judicial system, and digital democracy, to name a few. The Convention's principles, such as transparency, accountability, equality and non-discrimination, privacy and autonomy are particularly relevant to public services to ensure that AI systems used in public service delivery respect citizens' rights and maintain public trust.⁴⁰ Yet, the public sector may also face significant challenges in implementing the Convention on AI. Resource constraints can hinder the ability of public authorities to conduct thorough impact assessments and maintain high levels of transparency and accountability. This is particularly problematic in developing countries, where public sector entities may lack the necessary infrastructure and expertise to comply with the Convention's requirements. Addressing these resource constraints is essential for ensuring that public authorities as well as private actors can meet the Convention's standards.

Summary

AI systems need to comply with both legal and ethical standards. When referring to ethical guidelines, it is important to distinguish ethics from morality. Ethical reflection is not about identifying and justifying what is acceptable and desirable in

³⁸ Statewatch. Council of Europe Convention on Artificial Intelligence: zero draft and member state submissions, 2023. Available: <https://www.statewatch.org/news/2023/january/council-of-europe-convention-on-artificial-intelligence-zero-draft-and-member-state-submissions/> [last viewed 14.06.2025].

³⁹ Müller, A. Council of Europe creates rules.

⁴⁰ Council of Europe. Council of Europe adopts first international treaty on artificial intelligence. 17 May 2024. Available: <https://www.coe.int/en/web/portal/-/council-of-europe-adopts-first-international-treaty-on-artificial-intelligence> [last viewed 14.06.2025].

a given society but about critically reflecting from a rational standpoint on such rules and attempting to construct general, universally valid and unchanging standards.

The AI Act and Convention on AI are both pioneering efforts to establish a global framework for responsible AI development and application. In contrast to the Convention on AI, which contains several key principles, such as non-discrimination, privacy and transparency, the AI Act does not define general principles. The AI Act appears to address the absence of overarching principles within its framework by outlining these principles in the preamble and by pointing out that the application of those principles should be translated, when possible, in the design and use of AI models. The advancement of the drafting process of both AI legal frameworks demanded certain trade-offs to be made in order to achieve selected goals. Specifically, the AI Act contains numerous trade-offs between different ethical principles, fundamental rights and other values and interests (e.g., scientific progress, public services efficiency, public security interests), as well as more generically, between different objectives of the AI Act, namely, to protect fundamental rights and EU values and foster innovation in Europe. Those trade-offs represent potential challenges in the uniform application of the legal requirements, especially on the national implementation level. A potential threat is already seen in examples of the lack of concrete involvement of civil society in decision making processes, the influence of powerful interests on implementation procedures, inequality between states' abilities to implement and monitor implementation of the regulation (due to, for example, lack of the necessary infrastructure and expertise), the potential overuse of the national security exception, and others.

While the AI Act applies a risk-based approach and provides detailed, but less flexible requirements and mechanisms, the Convention on AI applies a human rights-based approach and introduces more generic, but also more flexible rules, which allows diverse implementation strategies, but also might lead to inconsistencies in application across different countries. The risk-based approach and the human rights-based approach both shape how problems are analysed and how solutions are prioritized. From the risk approach, the focus is preventing or managing *negative outcomes* (risks) of AI for individuals, groups, or systems. The primary goal would be to minimize harm, loss, or danger (e.g., disease outbreaks, security threats, environmental hazards). This approach tends to prioritize those at *highest risk*, which may leave others behind.

The human rights-based approach ensures that everyone enjoys their *basic human rights* (like health, education, safety, etc.). From this approach, duty-bearers (e.g., governments) must uphold their obligations to rights-holders (e.g., citizens) in relation with AI. It fosters enforceability in relation with negative impacts of AI.

Ethical principles and human rights-based approach will help adapt and overcome the limitations of AI regulation to facilitate its implementation in real-world. Ethical principles and human-rights based approach should lead the enforcement and implementation of AI regulatory frameworks and serve as a guide in the process of resolving various trade-offs between AI ethical principles, fundamental rights, values and societal interests. For ethical principles to guide the application of the AI regulation, the authors propose a modification in the understanding of ethics as "morality". Namely, ethics may become a powerful tool in governing AI, if perceived as a moral philosophy deeply rooted in foundational principles and capable of providing robust guidance. Furthermore, this approach is interconnected with human-rights based approach and could be integrated through mechanisms introduced by the new European AI regulation, such as fundamental rights impact assessment.

Acknowledgement

This article is based upon work from COST Action Global Digital Human Rights Network (GDHRNet), CA19143, supported by COST (European Cooperation in Science and Technology).

Slovenian Research and Innovation Agency, No. GC-0002, Large language models for digital humanities; No. P5-0221, Social control, criminal justice system, violence and the prevention of victimizations in the context of high technology market society.

This work is supported by the European Commission through project ASTOUND (101071191-HORIZON-EIC-2021-PATHFINDER CHALLENGES-01).

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<https://doi.org/10.22364/jull.19.04>

Reform of Latvian Inheritance Law

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In 2009, Latvia started modernizing the Inheritance Law part of the Civil Law adopted in 1937¹, and on 1 July 2014 the first amendments to this part entered into force. On 1 January 2025, the latest amendments to the Inheritance Law part of the Civil Law and related legislation entered into force, marking the end of the modernization process. During this period, a significant reform of the inheritance law has been carried out, modernizing the inheritance law and addressing the practical problems of succession that have arisen to date. The amendments were designed to clarify the succession process and ensure the timely return of the deceased's property to normal civil law circulation. The authors analyse the main innovations introduced during the reform, outlining the advantages of the new regulation and the potential problems in applying it in practice. The article offers consecutive examination of the most important changes related to the limitation of the liability of heirs towards the creditors of the deceased, the changes in the system of acceptance of inheritance and the amendments to the legal regulation of the concept of addition of what was previously received.

Keywords: reform of inheritance law, term of acceptance of inheritance, liability of heirs, addition of what was previously received (addition of previously received).

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¹ For details on the adoption of the Civil Law, see *Osipova, S. Familienrecht in der Republik Lettland im XX-XXI Jahrhundert/Kieler Ostrechts –Notizen [Family Law in the Republic of Latvia in the 20th–21st Centuries/Kiel East German Law Notes]. 1-2/2012. -15. Jahrgang, S. 47–60.*

Introduction

On 19 November 2009, the Cabinet of Ministers issued Order No. 797 “On the Concept on the Modernization of the Part of the Civil Law on the Inheritance Law” (hereinafter – the Concept)². Within the framework of the Concept, significant amendments to the Inheritance Law part of the Civil Law³ (hereinafter – CL)⁴ and related regulatory enactments, such as the Notariate Law⁵ and the Law on Orphan’s and Custody Courts, were developed and entered into force on 1 July 2014.⁶ These amendments introduced a number of significant changes to both the statutory and testamentary rules of succession, such as clarifying the rules of succession of adoptees in line with the general rules of adoption, limiting the forms of private testaments, as well as amending the concept of persons entitled to preferential share (until 1 July 2014 – irrevocable heirs) without changing the nature of this legal concept, and clarifying the nature and character of the preferential share. For example, Article 423(2)(1) of the CL provided that the persons entitled to preferential share had only a right of claim the delivery of the preferential share in cash. Such a provision is in line with the provisions of Article 425 of the CL and also better clarifies the stipulations laid down in Article 788 of the CL. However, a significant innovation was the second sentence of Article 423(2) of the CL, which provided that the right to the preferential share is an inheritable and transferable right, contrary to the earlier recognition that it is a personal right.⁷

At the same time, on 1 July 2014, extensive changes to the rules on the forms of testaments came into force. First of all, the absence of witnesses in the making of public testaments is to be noted. Secondly, the form of privileged testaments was excluded. Thirdly, the CL excluded provisions which provided for private testaments to be made in writing, but in the presence of two witnesses, written by technical means or in the handwriting of a third person, with the testator signing the testament himself. These amendments were necessary because it was recognized that these forms of testament were the easiest to forge. Moreover, since the entry into force of these amendments, a private testament can only be made in one form: the testator himself must write the entire testament in his own handwriting and sign it (see Article 446 of the CL), thus, facilitating the verification of the authenticity of such testament.

After the 2014 amendments entered into force, work on the modernization of the Inheritance Law part of the CL continued, and in the final stage of the reform,

² “On the Concept on the Modernisation of the Inheritance Law part of the Civil Law”: Cabinet of Ministers Order No. 797 of 19.11.2009 [expired]. Available: <https://likumi.lv/ta/id/200900-par-koncepciju-par-civillikuma-mantojuma-tiesibu-dalas-modernizaciju> [last viewed 03.04.2025].

³ Civillikums [Civil Law] (28.01.1937). Available: <https://likumi.lv/ta/id/90222> [last viewed 03.04.2025].

⁴ Grozījumi Civillikumā [Amendments to the Civil Law] (08.05.2014). Available: <https://likumi.lv/ta/id/266367-grozijumi-civillikuma> [last viewed 06.04.2025].

⁵ Grozījumi Notariāta likumā [Amendments to the Notariate Law] (08.05.2014). Available: <https://likumi.lv/ta/id/266365-grozijumi-notariata-likuma> [last viewed 06.04.2025].

⁶ Grozījumi Bāriņtiesu likumā [Amendments to the Law on Orphan’s and Custody Courts] (08.05.2014). Available: <https://likumi.lv/ta/id/266362-grozijumi-barintiesu-likuma> [last viewed 06.04.2025].

⁷ Latvijas Republikas Augstākās tiesas 27.03.1995. Plēnuma lēmums nr. 1 “Par likumu piemērošanu mantojuma lietās” [Decision No. 1 of the Plenum of the Supreme Court of the Republic of Latvia of 27 March 1995 “On the Application of Law in Inheritance Cases”, para. 41.2. In: Collection of Decisions of the Plenum of the Supreme Court of the Republic of Latvia 1990–1995. Rīga: Ministry of Justice of the Republic of Latvia v/s Legal Information Centre, 1995. See also: *Krauze, R., Gencs, Z.* Latvijas Republikas Civillikuma komentāri. Mantojuma tiesības (382.–840. p.) [Comments to the Civil Law of the Republic of Latvia. Inheritance rights (Articles 382–840)]. Rīga: Mans Īpašums, 1997, p. 52.

on 21 March 2024, the *Saeima* adopted the law “Amendments to the Civil Law”⁸ (hereinafter – the Amendments), which entered into force on 1 January 2025⁹. With these – the last amendments – the legislator resolved a number of legal issues highlighted in the Concept and in the study developed by the Council of Sworn Notaries of Latvia – “Problems of the Legal Regulation of the Inheritance Law Part of the Civil Law and the Need for its Modernization”¹⁰. The amendments

*introduced a significant reform of the inheritance law, which is expected to modernise the regulation of the inheritance law, as well as to solve the existing practical problems related to succession. The amendments were designed to clarify the succession process and ensure the timely return of the deceased’s property to normal civil law circulation.*¹¹

The latest amendments, adopted in 2024 and in force since 1 January 2025, cover a wide range of issues, introducing both conceptual changes that significantly alter the pre-existing regime (e.g., amendments to the time limit for acceptance of inheritance, liability of heirs for debts of the deceased) and wording changes that clarify the meaning of the respective provision or make it easier to perceive. For example, in the new wording of Article 396 of the CL, the previous list of relatives (descendants, adopted, ascendants, real siblings or their children, half-siblings or their children) is now replaced by a reference to categories (first, second or third category heirs), making clear the priority of the surviving spouse over the fourth category in the succession. This does not change anything substantive in this provision, but makes it easier to understand. By amending Article 423(3) of the CL, the legislator consolidated what had already been recognized in case law¹² and in doctrine that the persons entitled to preferential share do not have to specifically declare their right to the preferential share if they have already declared their right as heirs or legatees.¹³

Given the broad scope of the Amendments, this article will discuss what the authors consider to be the most important for them, focusing mainly on those aspects that could pose particular challenges for the future application of the legal provisions.

⁸ Grozījumi Civillikumā [Law “Amendments to the Civil Law”] (21.03.2024). Available: <https://likumi.lv/ta/id/350994-grozijumi-civillikuma> [last viewed 03.04.2025].

⁹ Mantinieks par aizgājēja paradsaistībām atbildēs tikai mantojuma apmērā [The heir will only be liable for the debts of the deceased to the extent of the estate] (21.03.2024). Available: <https://www.saeima.lv/lv/aktualitates/saeimas-zinas/33293-mantinieks-par-aizgajeja-paradsaistibam-atbildes-tikai-mantojuma-apmera> [last viewed 03.04.2025]. See also Grozījumi Civillikumā [Law “Amendments to the Civil Law”] (21.03.2024). Available: <https://likumi.lv/ta/id/350994-grozijumi-civillikuma> [last viewed 03.04.2025].

¹⁰ Pētījums “Civillikuma Mantojuma tiesību daļas tiesiskā regulējuma problēmjaūtājumi un to modernizācijas nepieciešamība” (2017) [Study “Problematic Issues of the Legal Regulation of the Inheritance Law part of the Civil Law and the Need for its Modernisation” (2017)]. Available: [inheritance-petition-final-law-20102017-final.pdf](https://www.inheritance-petition-final-law-20102017-final.pdf) (tm.gov.lv) [last viewed 07.04.2025].

¹¹ *Rusakovs, J. G.* Mantojuma tiesību reforma. Kas lēni nāk, tas labi nāk [Reform of the Inheritance Law. What comes slowly, comes well]. *Jurista Vārds*, 17(1335), 23 April 2024, pp. 6–7.

¹² See, for example, Riga Regional Court Judgment of 29 March 2019 in case No. C33409017. Available: <https://manas.tiesas.lv/eTiesasMvc/lv/nolemumi> [last viewed 06.04.2025].

¹³ See also the annotation to the draft law “Amendments to the Civil Law”. Available: <https://titania.saeima.lv/LIVS14/saeimalivs14.nsf/0/0F9E7DAD1BE534EFC2258A1C00413048?OpenDocument> [last viewed 06.04.2025].

1. Limiting the liability of heirs against the deceased's creditors

The main innovation of the Amendments is the introduction of limited liability of the heirs towards the creditors of the deceased.

According to Article 382 of the CL, the estate is an aggregate of assets comprising all movable and immovable property and the rights and obligations which the deceased, or the person that has been declared deceased, had at the time of his actual or legally presumed death. Even property which, at the time of the opening of the inheritance, was not yet included in the mass of the estate at the time of the acceptance of the inheritance, belongs to the heirs who have accepted the inheritance,¹⁴ since they, as universal successors, are continuation of the deceased person.

Until the Amendments the Latvian inheritance law had established the principle of *successio in universum ius defuncti*¹⁵. This is a principle of Roman law, which implies that the heir enters into a set of rights and obligations of the deceased person, in one whole,¹⁶ i.e., the heirs acquire both the assets and the liabilities of the estate.¹⁷ Thus, by accepting the inheritance, the heir acquires by a single action all the property of the deceased, his rights, various claims and outstanding debts, which, as the passive part of the estate, may sometimes even exceed the active part.¹⁸ For this reason, heirs have often found that, contrary to expectations, accepting the inheritance has entailed more costs than benefits, since the debts of the deceased turned out to exceed the value of the inheritance obtained.

The prospect of inheriting more debts than property, and of the heir knowing that he would have to pay them out of his own estate (*ultra vires hereditatis* “beyond the possibility of inheritance”), was a reason why, especially in the last phase of the Roman state, heirs hesitated to accept inheritance or refrained from accepting inheritance at all. This is why, in Justinian's time, it was permitted to accept an inheritance on the basis of a list of assets and debts drawn up in advance – an inventory list (*beneficium inventarii*). In this case, the heir was liable to creditors only to the extent of the inheritance accepted according to the list (*intra vires hereditatis* “within the limits of the inheritance”). In essence, this meant that the principle of universal succession was not respected.¹⁹ Thus, already in Roman law, it was possible for heirs not to overburden themselves with the debts of the deceased, even though this was a departure from the principle of universal succession.

¹⁴ Latvijas Republikas Augstākās tiesas 27.03.1995. Plēnuma lēmums nr. 1 “Par likumu piemērošanu mantojuma lietās” [Decision No. 1 of the Plenum of the Supreme Court of the Republic of Latvia of 27 March 1995 “On the Application of Law in Inheritance Cases”]. In: Collection of Decisions of the Plenum of the Supreme Court of the Republic of Latvia 1990–1995. Rīga: Ministry of Justice of the Republic of Latvia v/s Legal Information Centre, 1995, p. 73.

¹⁵ Kalniņš, V. Romiešu civiltiesību pamati [Fundamentals of Roman civil law]. Rīga: Zvaigzne, 1977, p. 173.

¹⁶ Gencs, Z. Mantošana. Zinātniski praktisks komentārs [Succession. Scientific and Practical Commentary]. Rīga: Tiesu namu aģentūra, 2002, p. 15. The principle of universal succession is also recognized in the legal systems of other countries, for example, in Swiss inheritance law. In more detail, see: Kren Kostkiewicz, J., Wolf, S., Amstutz, M., Fankhauser, R. (eds.), ZGB Kommentar [Commentary on the Swiss Civil Code (ZGB)]. 3. Auflage, Zurich: Orell Füssli Verlag, 2016, Art. 560, N. 1, p. 1088; Tuor, P., Schnyder, B., Schmid, J., Jungo, A., Das Schweizerische Zivilgesetzbuch [The Swiss Civil Code]. 14. auflage, Zurich: Schulthess Juristische Medien AG, 2015, p. 899.

¹⁷ Kalniņš, V. Romiešu civiltiesību pamati, p. 173. See also: Dr. Burandt, W., Rojahn, D. (Hrsg.) Erbrecht [Law of succession]. 3. auflage. München, C. H. Beck, 2019, pp. 188, 193.

¹⁸ Ibid.

¹⁹ Ibid., p. 192.

When the CL was adopted,²⁰ it continued the Roman law principle of allowing heirs to limit their liability for the debts of the estate by providing, in Article 708 of the CL, that the heir may be relieved of the obligation to be liable for the debts of the deceased with his own property if he uses the right of inventory, i.e., makes an inventory list of the whole estate within the time prescribed by law. However, according to Article 711 of the CL, the heir who has accepted an inheritance by right of inventory is liable for the debts and other claims of the heir against him only to the extent of such inheritance. Unfortunately, the time limit for the exercise of the right of inventory was very short in the CL – only 2 months from the opening of the inheritance.²¹

During the drafting of the amendments, it was concluded that the unwillingness of heirs to take the place of the deceased and to be liable for his debts with their own property is a significant factor hindering the acceptance of the inheritance and the opening of inheritance proceedings in front of notary public.

In looking for solutions to encourage more active acceptance of inheritances and, consequently, the opening and settlement of inheritance cases, it was recognized that a possible way forward would be to look at the then existing Civil Law framework –

*the law of inventories. In particular, the amendments, without introducing anything hitherto absent in the Civil Law with regard to the liability of heirs, provide that heirs shall henceforth always inherit by default with limited liability towards the deceased's creditors – to the extent of the inheritance. The amendments thus make inheritance with limited liability (inventory right) the sole succession regime and introduce/strengthen the principle that the creditors of the heir can only claim for their claims what belonged to the debtor – the heir. At the same time, given that inheritance with limited liability will henceforth be the only form of succession, such a succession regime no longer needs a special designation and therefore by the amendments to the Civil Law the terms “inventory right” and “inventory list” have been deleted.*²²

Consequently, at present, according to Article 707(1) of the CL, the creditors of the deceased must submit their claims to the heirs, who are liable for the claims of the deceased's creditors to the extent of the inheritance. The heirs are also liable to the extent of the inheritance if they wish to retain the inheritance. The introduction of such a regime has not necessitated an amendment of Article 382 of the CL, which is the legal definition of inheritance, but at the same time has ensured that heirs are not liable for the debts of the deceased with their own assets. Of course, the fact that the law allows the heir to be liable for the debts of the deceased to a limited extent does not mean that the heir cannot do so in full if he so wishes, but the creditor is no longer entitled to require the heir to pay the residual debts of the deceased if any remain after settlement of the estate (Article 707(6) of the CL). This is also fully in line with the abovementioned nature of the inventory right, since it was generally incompatible with the purpose of the inventory right for the heir who had accepted

²⁰ About the development of Civil Law, see: *Lazdiņš, J.* Latvian Law. The historical development. In: *Kerikmäe, T. Joamets, K., Pleps, J., Rodiņa, A., Berkmanas, T., Gruodytė, E.* (eds.). *The Law of the Baltic States*. Cham: Springer, 2017, pp. 156–157.

²¹ Article 709 of the CL (in the version until 31 December 2024).

²² *Bērziņš, J.* Galvenās izmaiņas mantojuma tiesību regulējumā Civillikumā un saistītajos normatīvajos aktos [Main Changes in the Regulation of Inheritance Law in the Civil Law and Related Legislative Acts]. *Jurista Vārds*, 17(1335), 23 April 2024.

the inheritance with the inventory right to be liable for the debts of the deceased also with his own assets or in excess of the amount of the inheritance received.²³

Undeniably, under such a regime, it is of the utmost importance to establish as precisely as possible in each inheritance case what is included in the mass of the estate and how valuable it is. Therefore, the list of inheritance (Article 696¹ of the CL), which lists the property belonging to the deceased and establishes its value, will be of major importance and will then also mark the limit of the heirs' liability. In accordance with Article 709 of the CL the list of inheritance may be drawn up by the heirs themselves or by a court bailiff. This also underlines the obligation of the notary public to take more active part in ascertaining the composition of the estate. Until 31 December,

the rules did not attach much importance to whether the certificate of inheritance indicated all the property comprising the estate; this was left to the discretion of the heirs. Only certain types of property (e.g. immovable property, vehicles, funds in credit institutions) has to be specified in the inheritance certificate, as this was required under the special statutory framework for the re-registration of the property in the name of the heir. Otherwise, the identification of the composition of the estate was of no legal significance, since the whole estate had passed to the heir as a set of rights and obligations, including all debts (unless the heir had limited his own liability through a right of inventory)²⁴.

However, currently Article 259¹ of the Notariate Law²⁵ obliges a notary public, after the opening of an inheritance case, to determine whether there is any property of the deceased registered in the state uniform digital Land Register, the State Cadastre Information System for Real Estate, the Register of Vehicles and Drivers, the Register of Enterprises and the Register of Accounts, as well as to determine, based on the information available in the state uniform digital Land Register, the Register of Commercial Pledges and the Credit Register, the creditors of the deceased whose claims are secured by a mortgage or a commercial pledge.

In order to balance the interests of heirs and creditors it is provided that creditors who have brought their claims within the time limit set out in the notice of the opening of the inheritance and creditors whose details have been entered in the inheritance file by the notary public have the right to consult the list of inheritance, and may contest the value of the inheritance, as valued by the heirs themselves, indicated in the inheritance list drawn up by the heirs, and request the notary public to instruct the court bailiff to prepare the inheritance list if one has not already been prepared (Paragraph 1 of Article 709 of the CL). Also, in order to prevent the heirs from settling only one creditor of their choice, Paragraphs 2, 3 and 4 of Article 707 of the CL provides that the heirs must respect the priority of claims by first settling the tax claims relating to the immovable property brought within the time limit specified in the notice of the opening of the inheritance and then the claims of the secured

²³ Judgment of the Senate of the Republic of Latvia, Department of Civil Cases of 16 December 2024 in case No. C30737819, SKC-50/2024, thesis. Available: <https://www.at.gov.lv/lv/tiesu-prakse/judikaturas-nolemumu-arhivs/civillietu-departaments/klasifikators-pec-lietu-kategorijam/civillikums/otra-dalamantojuma-tiesibas-382-840pants/sesta-nodala-mantojuma-pienemsana-un-iegusana-687-714pants> [last viewed 07.04.2025].

²⁴ *Kaupe, A.* Novitātes notariālajā procesā mantojuma reformas kontekstā [Innovations in notarial procedure in the context of the inheritance reform]. *Jurista Vārds*, 17(1335), 23 April 2024.

²⁵ Notariāta likums [Notariate Law] (01.06.1993). Available: <https://likumi.lv/ta/id/59982-notariata-likums> [last viewed 07.04.2025].

creditors. If the estate is insufficient to cover in full all the claims of the creditors having priority, they shall be covered on a *pro rata* basis. If, after the claims of the preferential creditors have been settled, the estate is left with assets, the claims of the other creditors shall be settled on a *pro rata* basis.

Given the limited liability of the heir, one of the most important issues will be the correct and uniform application of the concepts of “amount of the inheritance” (e.g., Articles 707 and 711 of the CL), “value of the inheritance” (e.g., Article 708 of the CL) and “value of the inherited property” (e.g., Articles 696¹ and 709 of the CL) as used in the CL. In the legal doctrine, even before the entry into force of the Amendments, it was recognized, when analysing possible problematic situations, that “a dispute as to the extent of the heir’s liability, or as to what is the ‘amount of the estate’ (the composition of the estate and its value) by which the heir is liable to the creditor, will have to be settled by a court”²⁶. Therefore, even after the adoption of these amendments the case law will play an important role in the uniform application and interpretation of the respective provisions.

2. Changes to the system for accepting inheritance

In Latvian inheritance law the acceptance of an inheritance depends on the action of the person invited to inherit, i.e., the expression of the will to accept the inheritance²⁷. According to Article 691 of the CL (in the version in force until 31 December 2024), the inheritance could be accepted either expressly (orally or in writing), or tacitly (by an act which, considering particular circumstances, could only be interpreted as a person acknowledging himself as a heir). Article 693 of the CL, on the other hand, laid down the time-limits within which the will to accept the inheritance had to be expressed, i.e., within the time-limit fixed by the heir, within the time-limit for the invitation or within the statutory time-limit of one year if the inheritance case has not been opened and the invitation has not been made. The possibility of tacit acceptance of the inheritance in actual possession, which was often provided for, was in practice the most confusing, both in terms of the obligation on the heirs to prove acceptance within the time-limit and in terms of whether the heir had successors in title and whether they had duly expressed their will to accept the inheritance.²⁸ The problem of tacit acceptance was also highlighted in the annotation to the Amendments:

In particular, the fact that the inheritance case has been opened before a notary public in which the particular heir has not expressed his will is irrelevant if the heir has already accepted the inheritance by actual possession (tacitly) in the past. Thus, the current rules allowing such acceptance of inheritance may adversely affect the creditors of the heir and other interested

²⁶ Pastars, E., Krauklis, M. Mantojuma tiesību reforma – kreditora skatījumā [Inheritance law reform – a creditor’s perspective]. *Jurista Vārds*, 17(1335), 23 April 2024.

²⁷ For comparison, for example, the Estonian Law of Succession (Pärimisseadus) provides that an active action is required from the heir specifically in order to disclaim the inheritance, stipulating that if the heir does not disclaim the inheritance within the time limit prescribed by law, he or she is deemed to have accepted it (Article 118 of the Estonian Law of Succession). Available: <https://www.riigiteataja.ee/en/eli/506112013007/consolide> [last viewed 27.07.2025].

²⁸ See the judgment of the Supreme Court of the Republic of Latvia, Department of Civil Cases, of 31 March 2014 in case No. SKC-115/2014. Available: <https://www.at.gov.lv/lv/tiesu-prakse/judikaturas-nolemumu-arhivs/civillietu-departaments/klasifikators-pec-lietu-kategorijam/civillikums/otra-dalamantojuma-tiesibas-382-840pants/sesta-nodala-mantojuma-pienemsana-un-iegusana-687-714pants> [last viewed 07.04.2025].

*parties who, in similar cases, cannot objectively ascertain the successors (heirs) to the liabilities and rights of the heir – their only recourse is to seek to establish those facts through legal proceedings. The possibility of tacit acceptance of an inheritance should therefore be improved by providing for definite and foreseeable consequences.*²⁹

The Amendments therefore seek to improve the procedure for the acceptance of inheritance. According to Article 691 of the CL, the will to accept the inheritance may be expressed either expressly in the application for inheritance, by filing it in the inheritance file, or tacitly, by an act which, considering particular circumstances, can only be interpreted as meaning that a certain person recognizes himself as a heir. At the same time, Article 693 of the CL has been amended to provide that, where the heirs have been summoned, the heir who has been summoned to inherit and has accepted the inheritance by silence (Article 691 of the CL) must express his will to accept the inheritance to the notary public within the time limit laid down in the announcement of the opening of the inheritance. Consequently, the only time limit that is preserved is the time limit for the invitation made by the notary public, since Article 693 of the CL no longer allows the heir to set a time limit for the acceptance of the inheritance, nor does it oblige the heir to express his will to accept the inheritance within one year from the opening of the inheritance. The amendments also do not provide for the complete abolition of the so-called acceptance of the inheritance in actual possession, but at the same time impose a strict obligation to break the silence in case the inheritance has been opened and the notary public has made the invitation. Otherwise (by not breaking the silence) the rights not claimed within the time limit will be extinguished. However, while recognizing that there may be situations where the heir, through no fault of his own, has missed the invitation period by not expressing to the notary public his will to accept the inheritance, the heir's right to bring an inheritance claim to the court to protect his rights is preserved. In such a case, it will be for the court to determine whether the heir has acted in good faith, having regard to the circumstances of the case and the evidence obtained, as the law does not lay down any criteria for this.

In Latvia, inheritance cases are handled by notaries public. The Amendments are therefore closely linked to the amendments to the Notariate Law³⁰, which were adopted simultaneously and also entered into force on 1 January 2025. Therefore, Article 293 of the Notariate Law³¹, as well as Article 259¹(2) of the Notariate Law³² should also be read in conjunction with Article 693 of the CL.

According to these rules, the invitation will henceforth have to be made in each inheritance case and the notary public will always have to identify the persons invited to inherit up to and including the third category, as well as the surviving spouse,

²⁹ Annotation to the draft law "Amendments to the Civil Law". Available: <https://titania.saeima.lv/LIVS14/SaeimaLIVS14.nsf/0/0F9E7DAD1BE534EFC2258A1C00413048?OpenDocument> [last viewed 07.04.2025].

³⁰ Grozījumi Notariāta likumā [Law "Amendments to the Notarial Law"] (21.03.2024). Available: <https://likumi.lv/ta/id/350996-grozijumi-notariata-likuma> [last viewed 07.04.2024].

³¹ When opening an inheritance case, a sworn notary shall announce the opening of the inheritance in the official publication "Latvijas Vēstnesis".

³² After the opening of the inheritance case, the notary public shall identify in the register of natural persons those who have been invited to inherit up to and including the third category and the surviving spouse, and inform them of the declaration of inheritance by means of a letter signed electronically, if the official electronic address is activated, as well as by sending a letter to the declared residence and other address known in the inheritance file.

regardless of who has opened the inheritance case, and inform these persons of the opening of the inheritance. Since a very wide range of persons can currently initiate the inheritance case (i.e., heir, a person inheriting in sequence after the person invited to inherit (substitute, sub-heir), the executor of the testament, the municipality in whose territory the real estate owned by the deceased is located, the municipal authority which is considered to be an interested party in the inheritance case, co-owner of the real estate, legatees or creditors, the legal entity shares of which were owned by the deceased, and the debtors of the deceased), the obligation of the notary public to inform the known heirs on the opening of the inheritance case is of particular importance, as it should reduce their (the heirs') lack of awareness of the opening of the inheritance case.

In summary, if the heirs have taken actual possession of the inheritance but have not opened an inheritance case, then, upon being notified by a notary public that someone else (e.g., a creditor) has opened an inheritance case, the heir will be obliged to break the silence and file an application for inheritance in the already opened inheritance case. Thus, the heirs' awareness of the opening of an inheritance case no longer depends only on the invitation notice in the official publication "Latvijas Vēstnesis", but an additional mechanism for informing those invited to inherit has been created – the obligation of the notary public to send a notification on the opening of an inheritance case.

There is another important innovation to be considered in the context of the announcement of opening of the inheritance. Article 297(2) of the Notariate Law provides that the time limit for the invitation to the creditors of the deceased shall be two months from the date of publication of the invitation, while the time limit for the persons invited to inherit, legatees and persons entitled to preferential share shall be no less than three months from the date of publication of the invitation, and the maximum time limit for the announcement to invite the heirs shall be twelve months. The notary public shall indicate in the announcement of the opening of the inheritance that the rights of the heirs not claimed within the time limit shall be extinguished and that the claims of creditors whose claims are not secured by a mortgage or a commercial mortgage not claimed within the time limit shall be extinguished.

Thus, as of 1 January 2025, when opening an inheritance case, the notary public shall indicate two different time limits in the invitation notice – one for the creditors and one for the persons invited to inherit, legatees and persons entitled to preferential share.

These different time limits will ensure that the heirs will have access to information on all creditors' claims in the inheritance file before the acceptance of the inheritance and that the heirs can make a more informed decision on accepting the inheritance, taking into account the possible liabilities of the estate³³.

Prior to the amendments, the law provided for a single time limit for the invitation – to the heirs to express their will to accept the inheritance, as well as to the creditors to submit their claims. Consequently, in practice, situations often arose where the heir was not aware until the last day of the invitation as to what would actually be included in the estate, since the creditor was also entitled to declare his right on the same last day of the invitation as the heir, who, in order not to lose his

³³ Bērziņš, J. Galvenās izmaiņas.

right, must express his will to accept the inheritance. In other words, the heir often inherited “a cat in a bag”. Now that the amendments have entered into force, such situations should no longer arise as creditors will always have a shorter time limit than heirs to claim their rights.

Attention should also be paid to the changes affecting bringing of the creditors’ claims. According to Article 705(2) of the CL creditors of the heir whose claims are not secured by a mortgage or a commercial pledge must submit their claims within the time limit specified in the announcement of the opening of the inheritance, while creditors whose claims are secured by a mortgage or a commercial pledge must be informed by the notary public handling the inheritance file (note to Article 705 of the CL). In other words, Article 705(2) of the CL now enshrines the principle, already upheld in case law, that

*the creditors’ claims which are not known to the heir must be submitted within the time limit laid down in the invitation; the effect of the invitation does not extend to creditors’ claims known to the heir, which, by reason of the public nature of the land register are to be regarded as mortgage claims registered in the land register*³⁴.

Given that the previous wording of Article 705 of the CL³⁵ provided in general terms for the extinguishment of creditors’ claims not filed within the invitation period, giving room for different interpretations in the application of the provision, the current wording of the provision is likely to unify the understanding of the provision and the practice of its application.

In the context of the amendments to the CL and the Notariate Law another important aspect should be considered. Namely, Article 3 of the Introduction to the CL provides that every civil law relationship shall be governed by the law in force at the time when the relationship was created, modified or terminated. According to this provision, the Inheritance Law framework of the CL, which entered into force on 1 January 2025, applies only to inheritance cases where the inheritance opened after that date. However, Article 41 of the Transitional Provisions of the Notariate Law provides that inheritance proceedings opened before 31 December 2024 shall be completed or terminated in accordance with the rules in force before 31 December 2024. This means that if the inheritance was opened, for example, on 17 November 2024, but the inheritance case was opened before a notary public on 18 December 2024, the rules of the CL in force at the time of the opening of the inheritance shall apply to the inheritance case and the previous procedural rules shall also apply to the handling of the inheritance case. However, if the inheritance is opened on 18 March 2025, the procedural rules applicable as of 1 January 2025 will apply, whereas the CL rules applicable will be those in force at the time of the opening of the inheritance. This means that limited liability of the heir for the debts of the deceased will not apply and the will to accept the inheritance will

³⁴ Judgment of the Supreme Court of the Republic of Latvia, Department of Civil Cases, 23 November 2017 in case No. C31512811, SKC-381/2017, p. 7. Available: <https://www.at.gov.lv/lv/tiesu-prakse/judikaturas-nolemumu-arhivs/civillietu-departaments/klasifikators-pec-lietu-kategorijam/civillikums/otra-dala-mantojuma-tiesibas-382-840pants/sesta-nodala-mantojuma-pienemsana-un-iegusana-687-714pants> [last viewed 07.04.2025].

³⁵ Creditors’ claims not submitted within the time limit specified in the invitation (announcement of the opening of the inheritance) shall be extinguished by issuing an inheritance certificate or a European Certificate of Inheritance or by an act closing the inheritance file (Art. 705(2) of the CL in the version until 31 December 2024).

have to be expressed within the time limits provided for in Article 693 of the CL until 31 December 2024. At the same time, the heirs will be obliged to draw up a list of the estate, but the list will not be relevant for the purpose of limiting liability for the debts of the deceased. Thus, one may see that the addressees of the respective legal provisions (heirs, creditors and other persons interested in the inheritance) potentially have been placed in unequal positions in comparable situations. Thus, potentially, it would have made sense to draw up a rule of law which would allow the substantive rules of law applicable to the inheritance to be those which are applicable not at the time when the inheritance opens, but at the time when the inheritance case is opened, regardless of how long ago the inheritance opened. This would result in a harmonized substantive and procedural framework for inheritance.

3. Changes to the legal framework for the concept of addition of previously received

In Latvian inheritance law, as in other jurisdictions³⁶, there has always existed the institute of addition of previously received, known from Roman law.³⁷

The concept of addition of what was previously received was

*based on the principle of fairness and equity and applied to the descendants of the deceased. If a descendant had already received a share of the inheritance while the deceased was alive, and if he wished to inherit, he was obliged either to add to the mass of the inheritance whatever he had previously received or to count it towards his share of the inheritance*³⁸.

The legal doctrine explains that it must be presumed that

*the deceased [...] wishes their [the descendants' of the deceased] share in the inheritance to be equal. If a descendant has already received a share of the estate during the lifetime of the deceased, then also if, after the death of the deceased, he wishes to inherit, he is obliged to 'equalize' [...] with the other heirs, either by adding to the mass of the estate what he has previously received or by including it in his share of the estate.*³⁹

Article 425(2) of the CL provides for the addition of the previously received part to the preferential share or its inclusion in the preferential share.

Until 31 December 2024, the existing legislation extended this obligation of equalization or the obligation to make an addition of what had been received previously to the surviving spouse and all descendants who wished to inherit from the deceased to almost everything that had been received during the deceased's lifetime (with the limitation set out in Article 763 of the CL). As part of the modernization of the Inheritance Law part of the CL it was concluded that "this approach – to allocate everything received from the testator during his lifetime – does not correspond to the modern reality of how and why people receive property from each other, and

³⁶ Comparative succession law. Volume II, Intestate succession. Reid, K., De Waal, M. J., Zimmermann, R. (eds.). Oxford University Press, 2015. pp. 88, 206–208, 304–305.

³⁷ Kalniņš, V. Romiešu civiltiesību pamati, p. 193.

³⁸ Krauze, R., Gencs, Z. Latvijas Republikas Civillikuma komentāri, p. 319; see also the judgment of the Senate of the Supreme Court of 5 June 2002 in case No. SKC-347. Available: On the Ownership of Real Estate in the Inheritance Mass. Jurista Vārds (juristavards.lv) [last viewed 07.04.2025].

³⁹ Dāle, K. Iepriekšēji saņemtā pievienojums [Addition of the previously received]. Rīga: [b.i.], 1938, p. 4.

should therefore be changed⁴⁰. Therefore, the amendments to Article 757 of the CL providing for a reasonable limitation to period to which the obligation of addition of what was previously received will apply, i.e., the obligation of addition will apply only to what the heir received from the deceased during the last five years of his life, are most welcome. However, the rule that the value of the property items to be added is to be determined by the condition in which they were at the time of receipt and by the prices at that time (Article 764 of the CL)⁴¹ was not amended.

Also noteworthy are the clarifying amendments to Article 763 of the CL, which harmonize the provisions of the CL, as well as codify the conclusions already made in case law. According to Article 763(1) of the CL, what the descendants received from the ascendants for maintenance (Article 179) and education in secondary schools is not to be added. It has been previously recognized in case law, that

*the envisaged exception to the addition of the previously received relates to expenses incurred by the deceased in the performance of his duty owed to the descendants arising out of the family relationship, in other words, these expenses cannot be considered as an additional benefit to which the addition of the previously received would apply.*⁴²

The current wording of Article 763(1) of the CL is therefore consistent with both the obligation to care for the child as part of the right of custody provided for in Article 177(4) of the CL and the obligation to maintain the child provided for in Article 179 of the CL.

By way of comparison, under German law, as a general principle, the obligation of addition of what was previously received in the case of intestate succession is incumbent on descendants.⁴³

Summary

The main objective of the reform of the law of inheritance was to simplify and modernize the inheritance law, to reduce practical problems in the handling of inheritance cases, and to ensure a clear, efficient and public-interest-oriented system of management of inheritance.

While it is not yet possible to fully assess its impact in practice, it is already evident that the reform:

- introduces a clearer, fairer and simpler approach to inheritance;
- improves the balance between the interests of heirs and creditors;

strengthens the role of notaries public in the inheritance proceedings.

The most important change concerns the liability of heirs for the debts of the deceased, as the principle has been introduced that heirs always inherit with limited liability – only to the extent of the inheritance received. The previously known possibility of inheriting by right of inventory is thus enshrined in the very basis of succession.

⁴⁰ Bērziņš, J. Galvenās izmaiņas.

⁴¹ For comparison see: Comparative succession law. Volume II, Intestate succession, p. 88.

⁴² Judgment of the Senate of the Republic of Latvia, Department of Civil Cases, 22 December 2022 in Case No. C33608317, SKC-109/2022. Available: <https://www.at.gov.lv/lv/tiesu-prakse/judikaturas-nolemumu-arhivs/civillietu-departaments/klasifikators-pec-lietu-kategorijam/civillikums/otradala-mantojuma-tiesibas-382-840pants/septita-nodala-lidzmantinieku-savstarpejas-attiecibas-un-mantojuma-dalisana-715-765pants> [last viewed 07.04.2025].

⁴³ German Civil Code. Bürgerliches Gesetzbuch (BGB). Volume II Books 4–5: §§ 1297–2385. Article-by-Article Commentary. Gannemann, G., Schulze, R. (eds.). München: C. H. Beck, 2022, pp. 993–994.

At the same time, the role of notaries public has been strengthened in the handling of inheritance cases, as notaries public are now required to take an active part in both the determination of the estate and the identification of heirs.

The reform has amended the system for the acceptance of inheritance, so that the will to accept the inheritance can now be expressed either before a notary public by submitting an application for inheritance or tacitly by taking possession of the inheritance. However, if an inheritance has opened and the opening of the inheritance has been announced (there will be an invitation notice), the heir who has tacitly accepted the inheritance will have to break his silence by expressing his will to accept the inheritance in an application for inheritance.

The development of the rules, which facilitate the obligation to add what has been previously received by providing that the obligation to add shall apply only to what has been received from the deceased during the last five years of his or her life, is a positive development. This means that, within the framework of the equalization obligation, only what was received from the deceased without remuneration during the last five years of their life is to be added to or counted toward one's inheritance share – that is, within a relatively recent period of the past. At the same time, it has been clarified that education and maintenance expenses received by a child from his or her parents in the exercise of the right of custody do not count towards the addition of what has been previously received.

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<https://doi.org/10.22364/jull.19.05>

On Practice of Applying Plea Agreement Procedure in Domestic Violence Cases in Light of Analysis of Decisions of Estonian Courts of First Instance

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Domestic violence is a serious crime, and a person which repeatedly resorts to violence does not do so accidentally, but with the specific aim of achieving their goal – total control and power over their partner. Combating and prevention of domestic violence is a labour-intensive and rather complex area, also for the judicial authorities: victims, in an attempt to cover up what has happened to them, often withdraw their accusations or do not dare to involve the judicial authorities and seek their help. There can be a number of reasons why victims of domestic violence may decide to do this, and studies have shown that this is the case: from fear of the perpetrator to the perception that their complaint will not be taken seriously by the judicial authorities, because it is very difficult to gather any credible evidence of what happened (and is happening) within the walls of the home. At the same time, however, the number of complaints of domestic violence has increased compared to a few years ago, and victims have a legitimate hope of escaping from a prolonged and torturous cycle of violence. However, even in domestic violence cases, the courts of first instance mostly apply an agreement that releases the perpetrator from the real prison sentence and he or she usually returns home, where he or she is fearfully awaited by close relatives who have suffered violence. In addition, the judicial function is moving from the courts to the prosecution. The study of the different facets of intimate partner violence gained a new focus with the adoption of the Istanbul Convention.

Keywords: domestic violence, plea agreement procedure, case law.

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Introduction

Violence is any intentional mental, physical, sexual or economic harm or threat of harm to another person, and regardless of the type of violence, there is always a mental aspect to it. Violence is perceived by the world community as a serious social problem that requires specific measures to address it, due to its extremely negative consequences such as homicide, disability, beatings, psychological trauma, depression, suicides, alcoholism, antisocial behaviour and dozens of other problems. In today's societies, all forms of violence are generally frowned upon. However, condemning violence must be accompanied both by action to prevent it and by the identification and implementation of effective means to prevent it. All this cannot be done without a systematic overview of the social realities of violence. Such a reality, relevant to violence in its various aspects, must be studied as fully as possible and accompanied by an appropriate analysis.

In 2017, Estonia joined the Istanbul Convention – Council of Europe Convention on preventing and combating violence against women and domestic violence.¹ In 2023, the Parliament of the Republic of Estonia – the *Riigikogu* – adopted a significantly improved Victim Support Act.² As a Member State of the European Union, Estonia has always supported the 2022 Directive of the European Parliament and of the Council on the prevention of violence against women and domestic violence. The awareness of people in Estonia about domestic violence and support organisations has been steadily increasing since Estonia regained its independence. It is precisely in the last few decades that many researchers around the world, including in Estonia, have studied different aspects of domestic violence from a doctrinal point of view, based on a large empirical database³ to develop measures to prevent and combat domestic

¹ Council of Europe Convention on preventing and combating violence against women and domestic violence. Istanbul, 11.V.2011. Council of Europe Treaty Series, No. 210. Available: <https://rm.coe.int/168008482e> [last viewed 15.07.2025].

² Ohvriabi seadus [Victim Support Act]. RT I, 06.01.2023, 1.

³ The problem is of a great scientific value today. A scientific approach requires a systematic approach. This approach is typical of works published in several scientific sources, e.g., *Linno, M., Soo, K., Strömpl, J.* Juhendmaterjal perevägivalda vähendamiseks ja ennetamiseks [Guidance material on reducing and preventing domestic violence]. 2011. Available: https://www.kriminaalpoliitika.ee/sites/krimipoliitika/files/elfinder/dokumentid/perevagivalda_juhis_kovidele_veebi.pdf [last viewed 15.07.2025]; *Soo, K., Strömpl, J.* Perevägivalda tõlgendused praktikutelt: Sekkumist raskendavad faktorid [Interpretations of domestic violence from practitioners: Factors complicating intervention]. – *Sotsiaaltöö ja sotsiaalpoliitika erialaajakiri [Specialised Journal of Social Work and Social Policy]* 3, 2011 Available: <http://www.just.ee/ee/orb.aw/class=file/action=p> [last viewed 22.11.2025]; *Talmazan, Y., Sirna, L., Ratto, H. M., Ing, N.* European countries develop new ways to tackle domestic violence during coronavirus lockdowns. NBC News, 03.04.2020. Available: <https://www.nbcnews.com/news/world/european-countries-develop-new-ways-tackle-domestic-violence-during-coronavirus-n1174301> [last

violence. Nevertheless, the fact remains that 41% of Estonian women say they have experienced or are experiencing intimate partner violence.⁴

In learning about the realities necessary for the further development of an effective system of justice, judicial decisions play a special role as “exemplars” of solutions that are in line with the law in a given time and space. But there are also specific requirements for the judgments themselves. For example, para. 2(2) of the Estonian Code of Administrative Court Procedure⁵ requires that a case must be settled fairly, honestly, within a reasonable time and at the lowest possible cost. Fairness in this case can also be understood as the fair administration of justice, and fairness is part of the idea of justice as its most important component. Fair trial is shaped by the case law of the European Court of Human Rights, based on Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms.⁶ In the Estonian legal order, there is a similar regulation in para. 15(1) of the Constitution of the Republic of Estonia⁷, which, in conjunction with para. 14 and 24 of the Constitution, provides for the fundamental right to effective judicial protection and the fair administration of justice.

The value of analysing judges’ decisions is certainly linked to their impartiality – the independence of judges is guaranteed by a number of legal requirements. Independence starts with the separation of powers, which ensures that the judiciary is separate from other forms of state power. The judge must be free to decide the case impartially, in accordance with the law. Impartiality has two interrelated aspects: subjective and objective. The subjective aspect means that the judge does not have any preconceptions about the parties to the proceedings, the objective side requires clarification of whether the judge has sufficient guarantees to exclude any doubt as to his impartiality. The judge must be protected from interference from, for example, the media, interest groups, public opinion, and especially other powers.⁸ It is the responsibility of the courts to ensure that the case is ready (“ripe”) for judgment. To this end, the court must have carried out all the procedural steps and the parties must have been given the opportunity to carry out the steps prescribed for them (has involved the necessary parties and informed them of the procedure; has clarified all the facts and identified the applicable law; has suggested how much effort the court

viewed 15.07.2025]; *Fleury-Steiner, R. E.* Legal Systems and Domestic Violence: Changes in Response to the COVID-19 Pandemic. *Journal of Family Violence*, 11 March 2025. <https://doi.org/10.1007/s10896-025-00850>; *De Oliveira Ribeiro Costa, J. C., Silva, M. M.* Prioritizing Public Policies to Combat Violence Against Women: A Multicriteria Decision Analysis. *Journal of Criminal Law*, 5 June 2025. <https://doi.org/10.1177/1077801221347605>; *Artand, R., and Herron, W. G.* (eds.). *Understanding domestic violence: theories challenges and remedies*. London, Rowman & Littlefield, 2018; *McQuigg, R. J. A.* *The Istanbul Convention, domestic violence and human rights*. London; New York: Routledge, 2017; *Jourgs, J.* Domestic violence and the criminal law: Reconceptualising reform. *Journal of Criminal Law*, 79(1), 6 February 2015, 55–70.

⁴ Eesti Statistikaameti suhteuring [Relationship survey by Statistics Estonia]. 03.04.2024. Available: <https://stat.ee/et/uudised/41-eesti-naistest-kogeb-paarisuhtes-vagivalda> [last viewed 15.07.2025].

⁵ Halduskohtumenetluse seadustik [Code of Administrative Court Procedure]. RT I, 05.07.2025, 7.

⁶ Euroopa inimõiguste konventsiooni artikkel 6 lg 1 – õigus õiglasele kohtulikule arutamisele – kriminaal- ja haldusajad [Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms – right to a fair trial – criminal and administrative matters]. Riigi Teataja [State Gazette] 30.12.2011. Available: https://www.riigiteataja.ee/oigusuudised/kohtuudiste_nimekiri/4328 [last viewed 15.07.2025].

⁷ Eesti Vabariigi põhiseadus [The Constitution of the Republic of Estonia]. RT I, 11.04.2025, 2.

⁸ Vt Eesti Vabariigi põhiseadus. Kommenteeritud väljaanne [See the Constitution of the Republic of Estonia. Annotated edition]. 2017. *Madise, Ü.* (ed.). para. 15 comm. 1, 2, 34 (author *Pilving, I.*); para. 146 comm. 15–16 (authors *Laidvee, J., Saarmets, V.*).

should expect to have to make in order to establish the facts and gather evidence about them; have discussed with the parties the possibilities for expressing their views and giving their evidence on the case).⁹ Failure to give reasons for the sentence imposed on the defendant is a breach of the requirement laid down in para. 264(5) of the Code of Criminal Procedure (KrMS) and a ground for setting aside the judgment¹⁰; in the case of contradictory or mutually exclusive evidence, the court or tribunal must base its decision on facts which reflect the true facts¹¹.

The focus of this article is on the judicial resolution of violent crimes committed in intimate relationships, with a focus on the plea agreement procedure. Based on the fact that the most common type of procedure in Estonian criminal proceedings is the plea agreement procedure (e.g., in 2023¹² 77% and in 2024¹³ 80% of criminal cases in first instance courts (i.e., County Courts) were settled by plea agreement procedure), the aim of this article is to highlight the circumstances of the application of this type of procedure in domestic violence cases, based on the decisions of Estonian courts of first instance. At the same time, the authors draw attention to the fact that, in connection with the extensive use of the plea agreement procedure in criminal proceedings, the function of administering justice is being transferred from the courts to the prosecution. The empirical material covered in the article includes judgments of Estonian courts of first instance from 2012 to 2024, a total of 604 judgments. The analysis was based on the judgments made in criminal proceedings, where the accused's offence is qualified on the basis of para. 121 of the Estonian Penal Code¹⁴ and in plea agreement procedure. As a scientific method, the authors of the current article used content analysis.

The authors outline what they consider to be problems in the application of the plea agreement procedure in the judicial resolution of cases of domestic violence and propose possible solutions to protect victims in the context of this problem.

1. Nature and basis of application of the plea agreement procedure

The court can hear a criminal case in several different types of proceedings: 1) the general procedure, i.e.. the classical adversarial procedure, where the parties (prosecution, defence and accused) present their evidence and the hearing includes questioning of witnesses, victims, accused, experts, etc.; 2) simplified and accelerated types of criminal proceedings – Abridged Procedure (at the request of the accused and the public prosecutor's office, the court may decide the criminal case on the basis of the material in the criminal file without calling witnesses, experts or specialists), Summary Procedure (if the evidentiary circumstances of a second-degree offence for which the public [court may, at the request of the public prosecutor's office, decide the criminal case in those proceedings) and plea agreement procedure. In addition to these three, there is a fast-track procedure in criminal proceedings, where

⁹ See *Kergandberg, E., Pikamäe, P.* (eds.). *Kriminaalmenetluse seadustik. Kommenteeritud väljaanne [Code of Criminal Procedure. Annotated edition]*. 2012, para. 305¹.

¹⁰ RKKK decision No. 3-1-1-13-98. Available: <https://www.riigiteataja.ee/kohtulahendid/fail.html?fid=206088418> [last viewed 15.07.2025].

¹¹ RKKK decision No. 3-1-1-3-98. Available: <https://www.riigiteataja.ee/kohtulahendid/fail.html?fid=206088398> [last viewed 15.07.2025].

¹² Kuritegevus Eestis 2023. Justiitsministeerium [Crime in Estonia 2023. Ministry of Justice]. Available: <https://www.justdigi.ee/kuritegevus2023/kriminaalmenetlus/> [last viewed 30.01.2025].

¹³ Kuritegevus Eestis 2024. Justiitsministeerium [Crime in Estonia 2024. Ministry of Justice]. Available: <https://www.justdigi.ee/kuritegevus2024/kriminaalmenetlus.html> [last viewed 21.07.2025].

¹⁴ Karistusseadustik [Penal Code]. RT I, 12.12.2024, 6.

the prosecutor submits a request to the court for a criminal case to be dealt with under the fast-track procedure within 48 hours of the person's arrest or immediately after questioning following the commission of the offence. The Fast-Track Procedure is conducted in accordance with the provisions of the general procedure, abridged procedure, plea agreement procedure or summary procedure.

A plea bargain is essentially a compromise in criminal law, the essence of which is to find the accused guilty (no acquittal is possible) and impose a simplified sentence. The prosecutor, the accused and the accused's defence counsel agree regarding all the consequences of the conviction (including the basic and supplementary sentence, expert and other costs and the settlement of the civil action) and the court confirms the agreement.

Plea agreement proceedings are popular because they serve the objectives of the parties to the proceedings, who have different interests: all the parties involved (the accused, the prosecution, the court) save money and time in this type of proceedings, the prosecution is sure of a conviction and the accused agrees to the sentence. The latter is particularly important for the accused if the plea bargain will help to avoid or minimise actual imprisonment. Uncompromising disputes are much easier to settle in situations where the bad outcome of losing a dispute is a financial penalty or probation. If the cost of a wrong decision could be prison, an agreement should usually at least be considered.¹⁵ At the same time, para. 8 of the Code of Criminal Procedure¹⁶ states that under the guise of popularity, it must not be allowed to derogate from the fundamental principles of criminal procedure, in particular the rights of the parties to the proceedings.

Nowadays, agreements have become part of criminal procedure worldwide. Their aim is to avoid either a full or pre-trial investigation or a public oral hearing, together with other guarantees of a fair trial.

Certainly, justice without a public oral hearing and a full assessment of the evidence is not an ideal solution. A legal scholar and a judge of the Court of Justice of the European Union wrote in connection with the changes in the paradigm of criminal procedure¹⁷ that the law and the case law of the Supreme Court of the Republic of Estonia give the court an extensive control function over both the voluntariness of the agreement and the compliance of its content with the law. The Supreme Court admonished the courts that in this procedure they must also determine in advance whether the act of which the accused is accused has been committed, whether the act was committed by the accused, whether the act constitutes a crime and under which section, paragraph and clause of the Penal Code it must be qualified.¹⁸ However, he also notes that due to the heavy workload of the judges, the temptation to accede to the prosecutor's request, and presumably the inability to delve into the merits of the case, is understandable. If, when approving an agreement, the judge assumes that the facts set out in the agreement have been proved, he or she has no obligation to check whether this is indeed the case unless the parties to the proceedings raise the issue. He concludes by stating that the importance of the principle of procedural

¹⁵ Vandeadvokaat Risto Käbi õigusblogi [Legal blog of lawyer Risto Käbi]. Available: <https://kabi.ee/kokkuleppemenetus-kriminaalasjas/> [last viewed 28.01.2025].

¹⁶ Kriminaalmenetluse seadustik [Code of Criminal Procedure]. RT I, 12.12.2024, 7.

¹⁷ *Lõhmus, U. Quo vadis kriminaalmenetus?* [Quo vadis criminal procedure?]. *Juridica*, 3, 2020, lk 198–209.

¹⁸ RKKK, 01.10.2012. Riigikohus. Kriminaalkolleegiumi kohtumäärus [Supreme Court. Criminal Chamber Order] No. 3-1-1-70-12, p. 9. Available: <https://www.riigiteataja.ee/kohtulahendid/fail.html?fid=206101356> [last viewed 07.03.2025].

economy in criminal procedural policy, as well as the use of privilege, has in practice shifted the administration of justice in criminal cases from the court to the prosecution. This being the case, the question arises as to when incitement to reach an agreement differs from the use of coercion to enforce an agreement.

Moreover, by giving the accused, as the weaker party in criminal proceedings, a defence against the state, as the stronger party, it is important to reduce the risks of abuse of the situation by the stronger party. In fact, the criminal procedure itself must contain legal frameworks to minimise abuses. All this is also aimed at protecting the interests of the victim in criminal proceedings.¹⁹

The basis for the application of the agreement procedure and the subjects of the application for this type of procedure are dealt with in paras. 239–242 of the Code of Criminal Procedure. Pursuant to para. 239 of the Criminal Procedure Code, the court may, at the request of the accused and the prosecution, settle the criminal case in a plea agreement procedure. Provisions that are primarily applied in the procedure of domestic violence cases (Penal Code, para. 121(1) (causing damage to the health of another person), para. 120 (threat), para. 137 (unauthorised surveillance) and para. 157³ (harassing pursuit), para. 153¹(1) (sexual harassment)) are not to be found in this list. Pursuant to para. 239 of the Criminal Procedure Code, the plea agreement procedure is also not applied in cases where the accused or his or her defence counsel or the prosecutor's office do not agree to it; in a criminal case with several accused persons, if at least one of the accused does not agree to the application of the plea agreement procedure; if the victim, the civil guardians or a third person does not agree to it. The consent of the injured party is not required for the application of the plea agreement procedure if the injured party is the State, a local authority or another public authority and the prosecution service has filed a civil action or a public-law claim instead of the injured party's representative. The accused and the prosecutor may apply to the court for the application of the plea agreement procedure before the end of the judicial investigation in the court of first instance.

As mentioned above, the agreement procedure can be initiated by the prosecution and requested by the accused or suspect (Sections 239, 240, 242 of the Criminal Procedure Code). The procedure for the plea agreement initiated by the prosecutor's office is laid down in para. 240 of the Criminal Procedure Code. If the Prosecutor's Office considers it possible to use the plea agreement procedure, the Office performs the following operations:

- 1) explains, to the suspect or accused and the civil defendant, the possibility of using that procedure, their rights under the procedure and the consequences of its application in the case;
- 2) draws up a report according to para. 243 of this Code concerning the consent of the civil defendant to the use of that procedure;
- 3) asks the victim to provide their consent to that procedure and asks an individual victim whether they wish to receive notification of the time of the hearing to be held in the case, unless the victim has previously expressed their opinion on these issues in the course of criminal proceedings, and explains that the victim does not have a right to withdraw their consent;
- 4) ascertains the opinion of the victim concerning the charges and the sentence, unless the victim has previously expressed their opinion about these issues in

¹⁹ Guarantees have been considered in Fair Trials, as well as Parliamentary Assembly of the Council of Europe. Available: https://www.juridica.ee/article_full.php?url=2020_3_i_quo_vadis_i_kriminaalmenetus_&pdf=1 [last viewed 10.02.2025], references 30, 31, 32.

the course of criminal proceedings and, where this is needed, sets a reasonable time limit for the victim to file a civil court claim, a statement of a public-law claim or an application for the compensation of costs of the case.

If the suspect or accused person wishes to apply the plea agreement procedure, he or she shall submit a written request to the prosecutor's office pursuant to para. 242 of the Criminal Procedure Code.

If the public prosecutor's office agrees to apply the plea agreement procedure, it will take the appropriate measures provided for in the Code of Criminal Procedure. If the public prosecutor's office refuses to apply the plea agreement procedure, the criminal proceedings will continue according to the general procedure. Neither the statistics from the courts nor those from the public prosecutor's office show who initiates the plea agreement procedure, but it seems that the prosecutor's office is the predominant initiator.

2. The basis for implementing the plea agreement procedure in domestic violence cases

When applying punitive measures, it is very important to distinguish whether an act qualifies as domestic violence. The Estonian Penal Code has only one paragraph distinguishing between domestic and other violence: Penal Code, para. 121.

Section 121(1) of the Penal Code deals with harm to the health of another person, as well as physical abuse causing pain, for which the offender is punishable by a fine or up to one year's imprisonment. On 01.01.2015 an amendment to this section of the Penal Code entered into force:

(2) *The same act, if:*

- 1) *it causes health damage which persists for at least four weeks;*
- 2) *committed in a close relationship or relationship of subordination; or*
- 3) *committed repeatedly;*

is punishable by a pecuniary punishment or up to five years' imprisonment.

(3) *An act provided for in subsection 1 or 2 of this section, if committed by a legal person, is punishable by a pecuniary punishment.*

Para. 121(2) of the Penal Code sets out the most serious offences in the first paragraph: injury to health lasting at least four weeks, commission of the offence in a close or dependent relationship, repeated commission of the same offence. Para. 2 of this section includes as an aggravating circumstance the commission of an offence in a close or dependent relationship, which can lead to imprisonment of up to five years. In both cases, the alternative to imprisonment is a pecuniary sanction, and in both cases neither the possibility of terminating the proceedings on the basis of an opportunistic sentence nor the possibility of not applying the sentence in full on probation is excluded. Under Estonian law, it is possible to prosecute a person for physical violence irrespective of the context in which the violence was committed.

Above, we have set out the factors to be taken into account when initiating and conducting plea agreement proceedings. Under Article 48 of the Council of Europe Convention on preventing and combating violence against women and domestic violence²⁰ prohibits compulsory alternative dispute resolution, including

²⁰ Naistevastase vägivalda ja perevägivalda ennetamise ja tõkestamise Euroopa Nõukogu konventsioon [Council of Europe Convention on preventing and combating violence against women and domestic violence]. RT II, 26.09.2017, 2.

mediation and conciliation, for all forms of violence falling within the scope of the Convention. Article 45 states that Contracting Parties shall adopt such legislative or other measures as may be necessary to ensure that the offences provided for in the Convention are punishable by effective, proportionate and dissuasive penalties, having regard to the gravity of the offence. These penalties include, where appropriate, deprivation of liberty, which may lead to extradition. Other measures, such as parental disqualification, may be imposed on the perpetrator if no other means can ensure the protection of the best interests of the child, which may include the safety of the victim. Article 46 lists the circumstances which, in so far as they do not yet constitute an offence, could be taken into account as aggravating circumstances in the context of judgments in respect of the offences provided for in the Convention, in accordance with the relevant provisions of national law: the offence was committed against a former or current spouse or partner by a family member, a person living with the victim or a person who abused his or her authority; the offence or related offences were committed repeatedly; the offence was committed against a person who was placed in a vulnerable state due to specific circumstances; the offence was committed against the child or in the presence of the child; the offence was committed by two or more persons acting together; the offence was preceded or accompanied by extreme violence; the offence was committed by the use or threat of a weapon; the crime caused serious physical or mental suffering to the victim; the perpetrator of the offence has previously been convicted of similar offences.

Taking into account the specifics of domestic violence and based on the list of circumstances aggravating liability outlined in the Istanbul Convention and drawing also on the literature²¹, it is interesting to find out how the courts have assessed and taken into account different circumstances when deciding on the possibility of applying the plea agreement procedure. In this article, we will look at the following: recidivism of the perpetrator, injuries inflicted on the victim, violence against children, the nature of the violent act (brutality), which is expressed, among other things, in the number of violent episodes.

1.1. Recidivism of the offender

Recidivism means repeated crime, but despite its simple definition, it can mean different things. In this case, we measure recidivism among offenders who have been sentenced to suspended imprisonment by a court in a plea agreement procedure and who were convicted of a new offence by a final judgment within two years of such an event. Particularly relevant in the context of this article are cases where a person re-offends for the same type of crime. According to statistics from the Ministry of Justice, 22% of those released from prison in 2021 for a domestic violence offence (para. 121(2)(2) of the Penal Code) were convicted of a new violent crime within two years.²²

The analysis of court decisions shows that between 2012 and 2024, 302 (50%) of the persons convicted under para. 121(2)(2) of the Penal Code and those released from prison (604 persons in total) had a previous conviction, i.e., 152 (50.3%) had a previous conviction for the same offence.

²¹ See reference 3.

²² Kuritegevus Eestis 2023. Justiitsministeerium [Crime in Estonia 2023. Ministry of Justice]. Available: <https://www.justdigi.ee/kuritegevus2023/retsidiivsus/> [last viewed 10.02.2025].

1.2. Injuries to the victim

As the predominant form of violence in intimate relationships is physical violence, it is these injuries, which are usually visible to the eye, that are considered when referring to injuries to the victim. Physical violence was 100% prevalent in the court decisions analysed. Mental (13.2%) and sexual violence (0.5%) occurred together with physical violence. The nature of physical injuries is shown in Table 1.

Table 1. Total injuries to victims (2012–2024)

Nature of the injury	Number of cases
Pain, swelling, haematomas	604
Open wound, bleeding	105
Tooth injury	4
Fracture of the bones in the nose	2
Burn wounds	1
Multiple fractures of the bones	32
Inside the skull	7
Death	1
Loss of consciousness	4
Patches of missing hair	1
Eye injury	2
Several injuries	25
Injuries are not described	14

As can be seen from the table, the most common injuries are bruising, swelling and pain, which can occur independently without major injuries or accompany more serious injuries. However, there are also cases in court practice where the perpetrator of violence has inflicted very serious multiple injuries on the victim in the course of a single crime episodes. For example, a case where the judgment lists injuries to one of the victims: bruising on the left arm, redness on the left leg, bruising on the right leg and right side, eye injury, fracture of the spine, fracture of the pelvis, closed fracture of the sacrum.²³

Table 1 shows that among the analysed court decisions, there was a case where the victim died as a result of intimate partner violence. Over a period of a few years, the perpetrator of the violence treated his wife with extreme brutality, repeatedly beating her in different parts of her body until she died. The court decision states, “Thus, M. S. committed an offence qualifiable according to para. 121(2) 2, 3 of the Penal Code, i.e., harming the health of another person, as well as painful physical abuse, committed in close relationship and repeatedly”. The perpetrator of the offence was sentenced by the court in a plea agreement procedure to 1 year 6 months imprisonment suspended for 2 years.²⁴

²³ Criminal case No. 1-22-7759. Available: <https://www.riigiteataja.ee/kohtulahendid/fail.html?fid=335190460> [last viewed 15.07.2025].

²⁴ Criminal case No. 1-20-7263. Available: <https://www.riigiteataja.ee/kohtulahendid/fail.html?fid=278959433> [last viewed 15.07.2025].

1.3. Violence against children

According to the preamble of the Istanbul Convention, children who witness domestic violence are also victims of domestic violence.

According to Article 26 of the Convention, the parties shall take the necessary legislative or other measures to ensure that in the provision of protection and support services to victims, due account is taken of the rights and needs of child witnesses of all forms of violence covered by the scope of this Convention. Measures taken pursuant to this article shall include age-appropriate psychosocial counselling for child witnesses of all forms of violence covered by the scope of this Convention and shall give due regard to the best interests of the child.

Between 2012 and 2024, 112 children were victims of domestic violence in Estonian first instance court cases, including those who witnessed domestic violence. The court also considered it possible to apply the plea agreement procedure in cases where the child was both a victim of domestic violence and a witness to the violence. For example, a person with a history of physical violence beat and strangled his partner in the presence of their 8-year-old son, and repeatedly beat the son with a strap on different days and at different times over eight years²⁵ and a case where a man brutally beat his wife in front of their three underage children, squeezed the neck of a child who had fallen asleep in his bed, pointed a starter pistol towards the children's room and threatened to shoot.²⁶ The following cases have also been settled in the plea agreement procedure: a father systematically physically abused his two minor children for a year and forced them to drink alcohol on their birthdays;²⁷ the stepfather repeatedly committed other acts of a sexual nature over a period of two years, and had sexual intercourse with his partner's underage daughter and also hit her with a strap.²⁸

1.4. Number of episodes of violence

The number of episodes of violence varied in the court decisions analysed: the number of single-episode cases was 324, the number of multi-episode cases was 279. The number of episodes of domestic violence over the last five years is shown in Table 2.

Table 2. Number of domestic violence episodes in court judgements 2020–2024

Number of episodes	2020	2021	2022	2023	2024
1	46	38	4	28	37
2	20	17	3	11	11
3	9	14	2	5	12
4	1	7	-	5	13
5	2	-	1	1	2

²⁵ Criminal case No. 1-21-163/6. Available: <https://www.riigiteataja.ee/kohtulahendid/fail.html?fid=286487054> [last viewed 15.07.2025].

²⁶ Criminal case No. 1-20-6379. Available: <https://www.riigiteataja.ee/kohtulahendid/fail.html?fid=401109806> [last viewed 15.07.2025].

²⁷ Criminal case No. 1-24-4648. Available: <https://www.riigiteataja.ee/kohtulahendid/fail.html?fid=388582120> [last viewed 15.07.2025].

²⁸ Criminal case No. 1-23-1082/15. Available: <https://www.riigiteataja.ee/kohtulahendid/fail.html?fid=336474712> [last viewed 15.07.2025].

Continuation of the Table 2

Number of episodes	2020	2021	2022	2023	2024
6	3	2	1	-	1
7	-	3	-	-	-
9				1	-
26					1

Table 2 shows that there are more episodes of domestic violence in 2024 than in the past, with court decisions confirming their high brutality.

The person was sentenced to conditional imprisonment for repeatedly (over several episodes) striking his partner with his foot on the back, foot to the groin, head and face, foot to the left side of the groin and head, fist to the nose, grabbing the victim by the neck, striking the victim with his fist to the eye, striking the victim with his foot, striking the victim with his foot to the stomach and hip. The decision was made in a plea agreement procedure. The victim suffered the following injuries: physical pain and haematoma in the lumbar region, injury to the left eye, haematoma in the eye region and fracture of the left VIII rib with slight displacement, haematomas, swelling in various parts of the body. The Court finds that the injuries caused are not life-threatening and that the recovery period is more than 4 weeks but not more than 4 months.²⁹ Among the court decisions in 2024, there is a case with 26 recorded episodes of violence, which occurred on the same day, as well as on different days at short intervals. In addition to physical violence, this case also involved 4 death threats. The perpetrator was sentenced to real imprisonment in a plea agreement procedure.³⁰

1.5. Penalties imposed in the plea agreement procedure

During the plea agreement procedure, the parties also reach an agreement on the fine. The basis of this procedure is an admission of guilt by the offender and the imposition of a penalty for the offence committed. It is then agreed that the prosecutor will ask the court not to impose a penalty (usually imprisonment). However, the court may also make other decisions.

An analysis of the case law shows that the sentences handed down in domestic violence cases between 2012 and 2024 are, as follows: 423 were sentenced to probation, 66 to real imprisonment, 65 to community service and 32 to financial penalties.

A look at the data for the last five years (Table 3) shows an increase in the number of both probation and real imprisonment compared to other types of sentences. This tendency can be explained by the fact that intimate partner violence has become predominantly more violent and the number of episodes of this crime has increased.

²⁹ Criminal case No. 1-24-4705. Available: <https://www.riigiteataja.ee/kohtulahendid/fail.html?fid=381423762> [last viewed 15.07.2025].

³⁰ Criminal case No. 1-24-3114/6. Available: <https://www.riigiteataja.ee/kohtulahendid/fail.html?fid=381246428> [last viewed 15.07.2025].

Table 3. Number of sentences for domestic violence offences in 2020–2024

Type of penalty	2020	2021	2022	2023	2024
Imprisonment on probation	56	54	6	36	63
Real imprisonment	7	9	1	8	10
Part in real terms, part on probation	6	8	1	2	1
Socially useful work	10	6	3	3	1
Financial penalty	2	4	0	2	2

The data provided confirms the above fact that the majority of criminal cases, including domestic violence cases, are settled by amicable settlement. In addition to the sanction, the parties also agree on control requirements and obligations. As a rule, these obligations are: live in the permanent place of residence designated by the court; appear for registration at the probation department at intervals specified by the probation officer; be supervised by a probation officer in his or her place of residence and provide the probation officer with information about the fulfilment of his or her obligations and means of subsistence; obtain prior permission from the probation officer to leave the place of residence for more than 15 days; get prior permission from the probation officer to change your place of residence, work or study; obtain prior authorisation from the probation officer to leave Estonian territory and to stay outside Estonian territory. Additional obligations may include: participate in a social programme assigned to them by their probation officer, not to drink alcohol during the time of the behavioural check.

Among the obligations in domestic violence cases, the most problematic is the requirement that the convicted person must reside in the (court-appointed) permanent place of residence, because it is usually the person's own permanent residence, where he or she lives with family members against whom he or she has been violent. The Istanbul Convention requires a stronger focus on protecting the victim and removing him or her from the perpetrator. Without the intervention of society (and the state), the victim of domestic violence is usually unable to protect themselves or get rid of the perpetrator. However, the main objective should always be to ensure the safety of the victim. One a compliance enforcement measure used is restraining order.

3. Restraining order

In Estonia, the implementation of a temporary restraining order is laid down in para. 141¹ of the Code of Criminal Procedure.³¹ It can be used to protect the privacy and other personal rights of the victim and is applied to a suspected or accused person with the consent of the victim. A prohibition on approaching is a prohibition on a suspect or accused person of an offence against the person or against a minor, at the request of the public prosecutor's office and on the basis of an order of the investigating judge or a court order, to be present in places designated by the court, to approach persons designated by the court and to communicate with them.

Pursuant to subsection 141³(1) of the same Act, it is also possible to modify the conditions of a temporary restraining order or to revoke a temporary restraining

³¹ Kriminaalmenetluse seadustik [Code of Criminal Procedure]. RT I, 12.12.2024, 7.

order upon the request of the victim or upon the request of the prosecutor's office and with the consent of the victim. Pursuant to para. 2 of the said provision, in order to issue an order modifying or revoking the conditions of the temporary restraining order, the investigating judge or the court shall consult the criminal file and question the suspect or accused person and the victim in order to clarify the grounds for the request. The public prosecutor, the injured party, the suspect or accused person and, at the request of the suspect or accused person, the defence counsel are summoned to appear before the investigating judge or the court.

According to para. 331(2) of the Estonian Penal Code,³² violation of a restraining order is a criminal offence and a person can be fined or imprisoned for up to one year.

The use of a restraining order in cases of domestic violence can sometimes be problematic. One of the shortcomings in the implementation of the protection order is the lack of awareness or the unclear understanding of the protection order by the victims, which has led to a "false perception" of the security provided by the protection order and to victims rethinking during the procedure and seeking the lifting of the temporary protection order or violating the terms of the protection order themselves. There are also problems in removing the perpetrator from the home, which need to be further analysed and resolved. At the request of the public prosecutor's office, a temporary restraining order can be applied as a preventive measure against the perpetrator of violence and a civil restraining order can be applied for up to three years in the event of a conviction. Scope and implementation of the restraining order is a problem when persons have the same place of residence: according to para. 32 of the Constitution, everyone's property is inviolable and exceptions can be made only in limited cases.³³

Court decisions show that restraining orders have been applied rather rarely – in 33 out of 604 cases. In the last five years, restraining orders were applied in Estonian County Court decisions, as follows: 2020 – 4 (5%); 2021 – 12 (15%); 2022 – 2 (18%); 2023 – 3 (6%); 2024 – 8 (10%).

Summary

The plea agreement procedure is a type of simplified and accelerated criminal procedure. The plea agreement procedure is popular because it serves the objectives of parties with different interests: all parties involved (accused, prosecution, court) save money and time when applying this type of procedure and if the applicable penalty is acceptable to the accused a sentencing agreement will help him or her to avoid or minimise real imprisonment.

The plea agreement procedure has become one of the main types of procedure in domestic violence cases. As a result of the analysis of the case law, the authors of the current study conclude that:

- 1) recidivism is relatively high among offenders who have been sentenced by a court to probation in a plea agreement procedure and have been convicted of a new offence within two years of such an event: of the 604 perpetrators, 302 (50%) had a previous conviction, of which 152 (50.3%) had a previous conviction for the same offence;

³² Karistusseadustik [Penal Code]. RT I, 12.12.2024, 6.

³³ Eesti Vabariigi põhiseadus [The Constitution of the Republic of Estonia]. RT I, 15.05.2015, 2.

- 2) in the analysed court decisions, physical violence occurred 100% of the time; psychological (13.2%) and sexual violence (0.5%) occurred together with physical violence;
- 3) between 2012 and 2024, there were 112 children who were victims of domestic violence in Estonian first instance court cases, including those who witnessed domestic violence. The court also applied the plea agreement procedure in cases where the child was both a direct victim of domestic violence and a witness to the violence;
- 4) of the judgments analysed, the highest number of cases of violence were single episodes – 324; there were a total of 279 multi-episode cases. At the same time, domestic violence cases in 2024 will be somewhat more episodic than in previous years, with court decisions confirming their high level of brutality;
- 5) between 2012 and 2024, in domestic violence cases, 423 perpetrators were sentenced to suspended prison sentences, 66 to real imprisonment, 65 to community service and 32 to financial penalties;
- 6) of the control requirements and obligations agreed in the plea agreement procedure, the most problematic is the requirement that the sentenced person must reside in the place of habitual residence (as determined by the court), as this is usually the perpetrators' own habitual residence, where they live with their family members against whom they have been violent;
- 7) restraining orders have been applied rather rarely – in 33 out of 604 decisions. The main shortcomings in the implementation of restraining orders are the victims' lack of awareness or understanding of restraining orders and the removal of the perpetrator from the home. The scope of the restraining period and the determination of the restraining orders are problematic when the persons have the same place of residence.

The authors are of the opinion that victims of domestic violence are not sufficiently protected by law and that there are deviations from the requirements of the Istanbul Convention.

They have already noted in the introduction that violence is perceived by the world community as a serious social problem that requires specific action.

And finally, *in futuro*, it would be necessary for Estonia to move towards a more comprehensive solution in the legal system to prevent and combat domestic violence. The authors propose the drafting and adoption of a law to this effect, in which the plea agreement procedure should also have its place. The number of countries that have adopted domestic violence law increases steadily. This will increase the capacity to protect victims from violence and the state's ability to hold perpetrators accountable.

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Vandeadvokaat Risto Käbi õigusblogi [Lawyer Risto Käbi legal blog]. Available: <https://kabi.ee/kokkuleppemenetus-kriminaalasjas/> [last viewed 28.01.2025].

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<https://doi.org/10.22364/jull.19.06>

Implementation of the Electronic Case System from the Perspective of Dialogue between Constitutional Bodies

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This article presents a critical overview of Latvia's implementation of the electronic case system, analysed through the lens of dialogue among constitutional bodies considering both the principle of interinstitutional loyalty and the principle of good lawmaking. It traces the reform's trajectory from its inception in the early 2010s to the most recent legislative amendments, evaluating how those bodies have delineated and communicated their respective competences, duties and procedural entitlements during implementation. Based on doctrinal analysis and indepth interviews, the authors find that the dialogue with the judiciary has, to date, remained predominantly formalistic.

Keywords: electronic case implementation, principle of inter-institutional loyalty, principle of good law-making, dialogue between constitutional bodies.

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Introduction

Digital transformation of justice systems is now one of the defining themes of European public-governance agendas. Developing a single electronic case file (hereinafter – e-case) promises greater transparency, reduced costs, and faster proceedings. Yet it also affects every phase of litigation – from the filing of claims to the enforcement of sentences – and therefore potentially touches on the very essence of the right to a fair trial. Such a reform should be developed in accordance with the principle of inter-institutional loyalty and the principle of good law-making. Parliament must therefore “ascertain, hear and evaluate” the views of all addressees of the new norm, including the judiciary whose daily work it transforms.

Publicly available sources, audit findings (see State Audit Office, 2021), and extraordinary plenary session of 9 December 2021 of the Supreme Court of the Republic of Latvia all suggest that the judiciary’s involvement was merely formal and came late.

To examine these considerations, the authors of the study employ doctrinal (normative) analysis and a historical method, namely, a process-tracing of the legislative history through scrutiny of Cabinet memoranda (2014–2021), parliament of the Republic of Latvia (*Saeima*) (hereinafter – *Saeima*) committee transcripts, parliamentary readings, and similar materials. The authors also use qualitative empirical inquiry – anonymised survey responses from judges regarding their knowledge of and preparedness for the electronic case, as well as in-depth interviews with key individuals involved in its development.

Given the scope of this study, the authors will examine whether, in introducing the e-case, the principle of mutual loyalty among constitutional bodies was observed and whether the legislature engaged in dialogue with the judiciary, in other words, whether the judiciary had an opportunity to be heard on this new regulation that substantially changes the courts’ work.

1. The principle of mutual loyalty and dialogue between constitutional bodies

The foundation of a state governed by the rule of law is the idea of popular sovereignty, in which state power is exercised by representatives legitimized by the people. This is the very essence of democracy – that is, rule by the people – rooted in the notion of each person’s intrinsic worth and dignity,¹ as well as in the concept of popular sovereignty itself. According to the teachings of Jean-Jacques Rousseau, the people possess an inalienable and indivisible right to govern themselves – sovereignty,² which no one who attains power has the right to appropriate, nor may the people themselves relinquish it.

Thus, in a state governed by the rule of law the source of power (the sovereign) is the people, and every decision, statute, and act of enforcement is carried out in the people’s name. This premise shapes the state’s fundamental operating principles and structure: the legitimacy of constitutional bodies and the legality of all public institutions are paramount. Moreover, the principle of separation of powers must be firmly embedded, creating at least three independent branches, or constitutional

¹ Lazdiņš, J. Experience of Reforms to the State Social Insurance in the Republic of Latvia after Restoring the Independence of the State *de facto*. Journal of the University of Latvia. Law, 17, 2024, p. 188.

² Rousseau, J. J. The Social Contract. Available: <https://www.earlymoderntexts.com/assets/pdfs/rousseau1762.pdf> [last viewed 20.03.2025].

organs, that function strictly within the bounds of law: the legislature, the executive, and the judiciary.³ The idea of the separation of powers flows from the demand for human liberty and the concept of popular sovereignty, not the other way around; human freedom and the people's right to self-determination must never be subordinated to the separation of powers. Accordingly, when applying this principle, it must always be remembered that authority originates with the people, and those who exercise it, including a legislature legitimized by the people, merely carry out the people's sovereign will.⁴

The concept of the society's will has also undergone considerable evolution – from classical democracy, where it was equated with the will of the majority, to today's understanding that the popular will is articulated and interpreted within the legal framework, above all through fundamental and human rights, and always in a way that safeguards democratic governance.⁵ For this system to function, the state needs a constitution that outlines the basic framework, establishing the legal foundation for the state's existence, structure, and system of law.⁶

Thus, we arrive at the central issue: the legislature's duty to listen to the addressees of a legal norm while working on a bill. This duty flows from the very nature of the legislature's legitimacy. Namely, members of parliament are empowered to decide on the people's behalf and in their name, giving effect to the people's will. Yet that will must first be ascertained. Hence citizens' participation in the law-making process, exercising their right to be heard by expressing opinions on a draft law or proposing amendments, is an integral part of legitimising the exercise of state power.⁷ In recent years, particularly in light of the threats to democracy in Europe, this topic has been widely examined in political debates, in scholarly doctrine, and in court decisions, including judgments of the Constitutional Court of the Republic of Latvia.⁸

When drafting a bill, the legislature is obliged both to examine the field that the proposed legislation would modify, including the existing legal landscape, and to hear the individuals or representatives of social groups whose lives the envisaged legal

³ *Schlosser, H.* Neuere Europäische Rechtsgeschichte [Recent European legal history]. 3. Auflage. München: C. H. Beck, 2017, S. 185, 186.

⁴ *Lazdiņš, J.* Consolidation of the Principle of Democratic Elections in the Law of the Latvian People. *Journal of the University of Latvia. Law*, 16, 2023, pp. 160–177.

⁵ *Horn, N.* Einführung in die Rechtswissenschaft und Rechtsphilosophie [Introduction to jurisprudence and legal philosophy]. 4., neu bearbeitete Auflage. Heidelberg: C. F. Müller, 2007, S. 76, 77.

⁶ Since the late 18th century and throughout the 19th century, European legal thought cultivated the idea of a state governed by the rule of law, whose functioning is grounded in a constitution. *Thiele, A.* Der konstituierte Staat. Eine Verfassungsgeschichte Neuzeit [The Constituted State: A Constitutional History of the Modern Era]. Frankfurt, New York: Campus, 2021, S. 248.

⁷ *Uhlmann, F., Konwrat, Chr.* Participation. In: *Legislation in Europe. Karpen, U., Xanthaki, H.* (eds.). Oxford, London: Hart Publishing, 2017, pp. 77, 78.

⁸ For example, judgment of the Constitutional Court of the Republic of Latvia of 26 November 2009 in case No. 2009-08-01. Available: https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2016/02/2009-08-01_Spriedums.pdf#search= [last viewed 12.05.2025]; judgment of the Constitutional Court of the Republic of Latvia of 19 May 2009 in case No. 2008-40-01. Available: https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2016/02/2008-40-01_Spriedums.pdf#search= [last viewed 12.05.2025]; judgment of the Constitutional Court of the Republic of Latvia of 18 February 2011 in case No. 2010-29-01. Available: https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2016/02/2010-29-01_Spriedums.pdf#search= [last viewed 12.05.2025], and others.

norm will affect.⁹ In a democracy, this is a constitutional duty that can be fulfilled in various ways, for example, by allowing the people themselves to initiate legislation, as stipulated in Article 64 of the Constitution,¹⁰ and by hearing experts and interested parties, both at the outset and during the preparation of the draft law, as well as later in the course of the legislative process.

The legislature, through legal norms, regulates not only the lives of private individuals but also the functioning of the state itself, including that of other constitutional bodies. Accordingly, when drafting a bill that affects the structure or operation of another constitutional organ, it must listen to the views of the rule's addressee and engage in dialogue. Although state authority is divided institutionally and functionally, it operates with a single aim – serving the sovereign's interests, and all constitutional organs, while performing different tasks, are equal. Thus the matter is not simply one constitutional organ's right to be heard in the legislative process; it is a question of respectful dialogue among constitutional organs, during which the principle of inter-institutional loyalty (derived from the separation-of-powers doctrine) must be honoured by all institutions of a democratic state governed by the rule of law.¹¹ Sovereign power can be exercised only by observing in practice the principle of mutual loyalty among constitutional bodies, as established in the Constitution.

2. Chronology of the introduction of the e-case and dialogue between constitutional bodies

2.1. Chronology of the introduction of the e-case

Before turning to the chronology of the e-case, which is crucial for analysing the dialogue among constitutional bodies in this case, it is necessary to outline its funding and project-management aspects. The e-case was financed mainly from the European Regional Development Fund (ERDF) under the Operational Programme “Growth and Employment”, Specific Support Objective 2.2.1, “To ensure greater re-use of public data and effective interaction between public administration and the private sector”, measure 2.2.1.1, “Creation of centralised ICT platforms for public administration and optimisation and development of public-administration processes”,¹² to enable the integration of the information systems of the various participating institutions into a single e-case.¹³ The project was spearheaded by

⁹ It should be noted, however, that in the current legislative process of the parliament of the Republic of Latvia (*Saeima*), the responsible committees also hear and consider the views of representatives from organizations and social groups whose rights will not be affected in the slightest by the proposed amendments. Their opinions are weighed on an equal footing with those of the groups whose interests the draft provision will directly affect.

¹⁰ Constitution of the Republic of Latvia of 15 February 1922, with amendments through 2019. Available: <https://likumi.lv/ta/id/57980-latvijas-republikas-satversme> [last viewed 22.02.2025].

¹¹ Paragraph 18.3.1 of the judgment of the Constitutional Court of the Republic of Latvia of 6 March 2019 in case No. 2018-11-01. Available: https://www.satv.tiesas.gov.lv/web/viewer.html?file=/wp-content/uploads/2018/07/2018-11-01_Spriedums.pdf#search= [last viewed 12.05.2025].

¹² According to information published by the Court Administration, Phase 1 of the e-case project received financing from both the European Regional Development Fund and the state budget. However, this article will not delve into the chronology of how that funding was disbursed. Available: <https://www.ta.gov.lv/lv/e-lietas-1posms> [last viewed 10.03.2025].

¹³ Publication on the Court Portal: “A unified electronic case system will be introduced within three years”. 21 March 2018. Available: <https://www.tiesas.lv/aktualitates/vienotu-e-lietu-ieviesis-tris-gadu-laika-7994> [last viewed 10.03.2025].

the Ministry of Justice and its subordinate Court Administration. According to an interview with Jorens Liopa, a Court Administration representative at the time, the amount of foreign funding was insufficient for a project of this scale. Consequently, the initiative was fragmented and divided into several components. Nonetheless, the justice sector took on overall responsibility for managing the project.¹⁴ Accordingly, the project-management aspects of implementing the e-case influenced the effectiveness of dialogue among all stakeholders from the very outset.

In tracing the origins of the e-case, it should be noted that based on an interview with former Minister of Justice Jānis Bordāns – the idea was first considered at the political level as early as 2011.¹⁵

The first publicly available references to the e-case emerge in 2014, when work on developing the project began. Former Ministry of Justice State Secretary Raivis Kronbergs likewise points to 2014 as the starting point of the e-case concept.¹⁶ On 21 August 2014, the Ministry of Justice submitted a report for further action to the meeting of the ministries' state secretaries.¹⁷ The informational report of 21 August 2014 stated that a critical precondition for implementing the e-case project was the commitment of the principal institutions – the Ministry of the Interior (State Police), the Office of the Prosecutor General of Latvia, and the Ministry of Justice (Court Administration) – to reform investigation and court-procedure workflows by moving from paper-based document circulation to electronic circulation.¹⁸ The stated goals of the e-case project were to enable electronic litigation, improve access to legal information, shorten the duration of court proceedings, allow claims and other documents to be filed quickly and conveniently online, cut the state's postal costs, and give parties the opportunity to review case materials without having to appear at the courthouse in person.¹⁹ Personal interviews with officials involved in implementing the e-case indicate that, beyond the officially stated objectives, the project also aimed to increase transparency in judicial proceedings and to combat corruption user convenience, and enabling judges and prosecutors to see lawyers' workload calendars.²⁰

In practice, the project began to move forward during the tenure of former Minister of Justice Dzintars Rasnačs, when the first funding was secured.²¹ Publicly available sources do not reveal the exact date when the first funding was received.

¹⁴ Interview conducted by the authors with Jorens Liopa who served as Deputy Director of the Information Systems and Technology Department of the Court Administration at that time. Riga, 20 and 21 July 2023. From the authors' personal archive.

¹⁵ Interview conducted by the authors with Jānis Bordāns, who served as Minister of Justice from 5 July 2012 to 22 January 2014 and again from 23 January 2019 to 14 December 2022. Riga, 29 May 2023. From the authors' personal archive.

¹⁶ Interview conducted by the authors with Raivis Kronbergs, who served as State Secretary of the Ministry of Justice from 2014 to 2021. Riga, 3 July 2023. From the authors' personal archive.

¹⁷ Ministry of Justice report on further action, draft No. VSS-787, TA-3124. Available: <https://tap.mk.gov.lv/mk/tap/?pid=40331567> [last viewed 11.03.2025].

¹⁸ Ministry of Justice report "On the Implementation of the e-case Project During the European Union 2014–2020 Structural Funds Planning Period". Available: <https://tap.mk.gov.lv/mk/tap/?pid=40331567> [last viewed 11.03.2025].

¹⁹ Informative report of the Ministry of Justice "On the Implementation of the e-case Project During the European Union 2014–2020 Structural Funds Planning Period". Available: <https://tap.mk.gov.lv/mk/tap/?pid=40331567> [last viewed 11.03.2025].

²⁰ Interview conducted by the authors with Raivis Kronbergs, who served as State Secretary of the Ministry of Justice from 2014 to 2021. Riga, 3 July 2023. From the authors' personal archive.

²¹ Interview conducted by the authors with Raivis Kronbergs, who served as the State Secretary of the Ministry of Justice from 2014 to 2021. Riga, 3 July 2023. From the authors' personal archive.

However, an interview with J. Liopa indicates that in 2016 project descriptions began to be drafted and an initial framework for the e-case was put together.²²

Only on 21 March 2018 did information emerge that, with the signing of contracts between several justice-system institutions and the Central Finance and Contracting Agency, implementation of the unified e-case project would begin. The announcement noted that a single, accessible platform was planned to be in place by 2021.²³

Around this time (2018), court presidents knew that the e-case was being developed, but they were not taking part in its design. The Chief Justice of the Supreme Court of the Republic of Latvia, Aigars Strupišs, remarked that it was a surprise to see the e-case start operating so quickly.²⁴ Most judges are not even aware of the e-case's existence.²⁵ An interview with J. Liopa indicates that the technical development of the e-case project began in 2019.²⁶

Although, under the ERDF project, some judges joined delegations that travelled to foreign courts to gain experience,²⁷ yet the information does not reach the wider community of judges.²⁸ While plans and projects for introducing the e-case through 2021 were being developed, the judiciary's opinion was still not heard. The attendance of a few judges mandated by neither the Judicial Council nor the Judges' Association at working-group meetings cannot be regarded as judicial involvement, noted A. Strupišs, Chair of the Judicial Council and Chief Justice of the Supreme Court of the Republic of Latvia.²⁹ And this is borne out by anonymous responses from judges, in which 2021 is generally cited as the point when they first learned about the e-case project.³⁰

On 11 January 2021 the State Audit Office released its findings, concluding that major improvements were needed in the management of the e-case. No organisational structure had been defined or established to oversee the programme as a whole and to ensure its objectives were met. The programme's scope was unclear, and the implementation already under way was fragmented into several projects lacking common management and supervision. The audit found that the country had neither

²² Interview conducted by the authors with Jorens Liopa who served as Deputy Director of the Information Systems and Technology Department of the Court Administration at that time. Riga, 20 and 21 July 2023. From the authors' personal archive.

²³ Publication on the Court Portal: "A Unified e-case System Will Be Introduced Within Three Years". 21 March 2018. Available: <https://www.tiesas.lv/aktualitates/vienotu-e-lietu-ieviesis-tris-gadulaika-7994> [last viewed 15.03.2025].

²⁴ Interview conducted by the authors with Aigars Strupišs, Chief Justice of the Supreme Court of the Republic of Latvia. Riga, 5 July 2023. From the authors' personal archive.

²⁵ Out of 20 respondents in the anonymous surveys, only three judges indicated that they were aware of the e-case around 2018. Meanwhile, eight respondents stated that they first learned about the e-case in 2021. From the authors' personal archive.

²⁶ Interview conducted by the authors with Jorens Liopa who served as Deputy Director of the Information Systems and Technology Department of the Court Administration at that time. Riga, 20 and 21 July 2023. From the authors' personal archive.

²⁷ Interview conducted by the authors with Raivis Kronbergs, who served as State Secretary of the Ministry of Justice from 2014 to 2021. Riga, 3 July 2023. From the authors' personal archive.

²⁸ Responses from 20 respondents to the survey questions. From the authors' personal archive.

²⁹ Interview conducted by the authors with Aigars Strupišs, President of the Supreme Court of the Republic of Latvia. Riga, 5 July 2023. From the authors' personal archive.

³⁰ Responses from 20 respondents to the survey questions. From the authors' personal archive.

an overall vision nor an action plan for creating the e-case, and that its implementation was scattered across multiple projects with no unified oversight.³¹

On 24 March 2021, the Cabinet of Ministers planned to consider draft orders extending the deadline for the first stage of the e-case programme to 30 November 2021. The official reason cited for the extension was the negative impact of the Covid-19 pandemic on the pace of user training for the programme and on the courts' readiness for its introduction.³² Training for judges and court staff, aimed at ensuring the gradual introduction of the e-case, began on 23 November 2021.³³

On 15 October 2021 the Ministry of Justice submitted to the Presidium of the *Saeima* the draft Law on the e-case Shared-Solution Platform, which had been endorsed at a Cabinet of Ministers meeting.³⁴ The explanatory memorandum to the draft act states that the bill has been drawn up to regulate the e-case shared-solution, govern the platform's operation, and create a legal basis for public authorities to process personal data via the e-case shared-solution platform. In turn, other participants in proceedings would be able to access case materials through the e-case portal.³⁵ The documents accompanying the bill state that, in the first phase of the e-case programme, the main focus is on court proceedings, including pre-trial stages in the prosecutor's office and the enforcement of sentences, and that four information systems are therefore currently being developed: the Court Information System (TIS), the Prosecutor's Information System (ProIS), the State Probation Service Information System (PLUS), and the Prison Administration's Inmate Information System.³⁶ The second phase of the e-case, in turn, envisages upgrading the participating information systems and shared solutions while digitising the investigative process. At this stage, the investigative authorities will be brought into the e-case system.³⁷

³¹ State Audit Office audit of 11 January 2021 "Effectiveness of the Investigation and Adjudication of Economic and Financial Crimes" No. 2.4.1-34/2019. Available: <https://www.lrvk.gov.lv/lv/revizijas/revizijas/noslegtas-revizijas/noziedzigu-nodarijumu-ekonomikas-un-finansu-joma-izmekšanas-un-iztiesanas-efektivitate> [last viewed 12.05.2025].

³² Publication on the Court Portal: "Necessary Steps Are Being Taken for the Gradual Implementation of the First Phase of the e-case." 24 March 2021. Available: <https://www.tiesas.lv/aktualitates/tiek-veikti-nepieciesamie-soli-pakapeniskai-e-lietas-pirma-posma-ieviesanai-10229> [last viewed 12.05.2025].

³³ Ministry of Justice press release of 23 November 2021: "Training Webinars Launched for Judges and Court Staff on the Regulatory Framework of the e-case." Available: <https://www.tm.gov.lv/lv/jaunums/uzsak-macibu-vebinarus-tiesnesiem-un-tiesu-darbiniekiem-par-e-lietas-normativo-regulejumu> [last viewed 12.05.2025].

³⁴ Information on the progress of the draft law "Law on the Conduct of Proceedings in an Electronic Environment on the State Platform" and related documents. Available: <https://titania.saeima.lv/LIVS13/SaeimaLIVS13.nsf/webSasaiste?OpenView&restricttocategory=1205/Lp13> [last viewed 12.05.2025].

³⁵ Initial Impact Assessment Report (Annotation) of the Draft Law "Law on the Shared e-case Solutions Platform". Summary of the draft legislation annotation. Available: <https://titania.saeima.lv/LIVS13/saeimalivs13.nsf/0/3BABC8A7A452F505C225876F001FFA81?OpenDocument> [last viewed 12.05.2025].

³⁶ *Ibid.*

³⁷ Initial Impact Assessment Report (Annotation) of the Draft Law "Law on the Shared e-case Solutions Platform". Summary of the draft legislation annotation. Available: <https://titania.saeima.lv/LIVS13/saeimalivs13.nsf/0/3BABC8A7A452F505C225876F001FFA81?OpenDocument> [last viewed 12.05.2025].

At its first reading, the bill was adopted without extensive discussion.³⁸ At the second reading, the draft law was amended only to fine-tune a few details, and there was no substantive debate on the project. The committee in charge had before it only the proposals of Ministry of Justice, an opinion from the Parliament's Legal Bureau, and a letter from the Latvian Association of Out-of-Court Debt Collectors.³⁹ The judiciary was not involved. Likewise, at the third reading the only amendments came from the Ministry of Justice, accompanied by an opinion from the Parliament's Legal Bureau. Moreover, the transcript of the third reading shows that the substance of the bill was not discussed at all.⁴⁰

Thus, from the course of adopting the regulatory act governing the e-case, one may conclude that Parliament offered virtually no significant resistance or counterarguments to its legalization.

However, while the draft Law on the e-case shared-solution platform was making its way through parliament, changes concerning the e-case were also introduced into procedural legislation – namely, amendments to the Administrative Procedure Law⁴¹ and Civil Procedure Law.⁴² The amendments to the Administrative Procedure Law entered into force on 1 December 2021, whereas the amendments to the Criminal Procedure Law took effect on 2 November 2021.⁴³

The judiciary reacted to these procedural amendments without delay. On 9 December 2021, the Supreme Court of the Republic of Latvia held an extraordinary plenary session convened by Chief Justice Aigars Strupišs. According to the Court's press release, the session was called because of a rushed and ill-considered transition to electronic case handling that failed to provide adequate functionality in the Court Information System or the courts' technical equipment – circumstances that could infringe individuals' right to a fair trial.⁴⁴ The Supreme Court of the Republic of Latvia noted that, without prejudice to the procedural-law requirements to digitise case materials and produce court documents electronically where no technical obstacles

³⁸ Transcript of the 13th *Saeima* of the Republic for the first reading of draft law No. 1205/Lp13 “Law on the Conduct of Proceedings in an Electronic Environment on the State Platform”. Available: [https://titania.saeima.lv/LIVS13/saeimalivs13.nsf/0/c4d702fb1e50671cc22587b30047b944/\\$FILE/Lp1205_1.htm](https://titania.saeima.lv/LIVS13/saeimalivs13.nsf/0/c4d702fb1e50671cc22587b30047b944/$FILE/Lp1205_1.htm) [accessed on 12 May 2025].

³⁹ Documents of the responsible committee of the 13th *Saeima* of the Republic for the second reading of draft law No. 1205/Lp13 “Law on the Conduct of Proceedings in an Electronic Environment on the State Platform”. Available: <https://titania.saeima.lv/LIVS13/SaeimaLIVS13.nsf/webSasaiste?OpenView&restricttocategory=1205/Lp13> [last viewed 12.05.2025].

⁴⁰ Transcript of the 13th *Saeima* of the Republic for the third reading of draft law No. 1205/Lp13 “Law on the Conduct of Proceedings in an Electronic Environment on the State Platform”. Available: <https://titania.saeima.lv/LIVS13/saeimalivs13.nsf/0/2EED4537931BD647C2258807004DBC3A?OpenDocument> [last viewed 12.05.2025].

⁴¹ Amendments to the Administrative Procedure Law: Latvian law. Adopted on 11 November 2021. Available: <https://likumi.lv/ta/id/327842-grozijumi-administrativa-procesa-likuma> [last viewed 12.05.2025].

⁴² Amendments to the Civil Procedure Law: Latvian law. Adopted on 11 November 2021. Available: <https://likumi.lv/ta/id/327843-grozijumi-civilprocesa-likuma> [last viewed 12.05.2025].

⁴³ Amendments to the Criminal Procedure Law: Latvian law. Adopted on 7 October 2021. Available: <https://likumi.lv/ta/id/326944-grozijumi-kriminalprocesa-likuma> [last viewed 12.05.2025].

⁴⁴ Press release of the Supreme Court of the Republic of Latvia of 9 December 2021: “The Supreme Court Plenary Identifies Significant Deficiencies in the Implementation of the e-case and Decides on Measures to Protect the Interests of Case Participants”. Information prepared by R. Zvejniece. Available: <https://www.at.gov.lv/lv/jaunumi/par-notikumiem/augstakas-tiesas-plenums-konstate-butiskus-trukumus-e-lietas-ieviesana-un-lemj-par-pasakumiem-lietu-dalibnieku-interesu-aizsardzibai-10911> [last viewed 15.03.2025].

exist, it should still be permissible to maintain case files in paper form, incorporating into the record printed copies of every document submitted electronically and every document the courts prepare electronically.⁴⁵

Information about shortcomings in the implementation of the e-case project began to surface more widely in public. On 14 December 2021 a report was published stating that significant deficiencies had been found in the e-case rollout, chiefly citing the points made in the plenary decision of the Supreme Courts of the Republic of Latvia.⁴⁶

2.2. Dialogue between the constitutional organs

The Constitutional Court of the Republic of Latvia has stressed that public participation in the legislative process flows from the fundamental principles on which a democratic state operates, while the legislature remains free to decide how the views of the public are ascertained and heard. Specifically, the Court has recognised that, when adopting a legal norm, the opinions expressed must be listened to and assessed. It has also noted that “the legal framework does not prescribe any particular form in which the legislature must hear a given organisation or individual, nor does it mean that a negative opinion from such organisations or persons would bar the legislature from adopting the norm in question.”⁴⁷ Thus, an individual’s right to be heard does not entail a right to obtain the legal regulation he or she prefers. Accordingly, during the legislative process the lawmaker must evaluate the proposals submitted and consider alternative solutions that restrict individual rights as little as possible. That is the legislature’s duty: to listen, to assess, to weigh, and ultimately to decide.

When discussing effective lawmaking in general, consultations are also recognized as an important component in international practice. For example, the 2023 OSCE (ODIHR) Guidelines on Democratic Lawmaking for Better Laws (peer-reviewed by the European Commission for Democracy through Law (Venice Commission), the Organisation for Economic Co-operation and Development, and the Parliamentary Assembly of the OSCE) state: “The requirement to consult draft policies and laws derives from the overall need for transparency and good governance in public institutions, and also to allow individuals and the wider public to participate in public affairs within the sense of Article 25 of the ICCPR on the right to participation, and to exercise other rights, such as freedom of expression (including the right to freedom of information).”⁴⁸ Additionally, the Venice Commission has noted that “Complex and controversial bills would normally require particularly long advance notice, and should be preceded by pre-drafts, on which some kind of (internet) consultation takes place. The public should have a meaningful opportunity

⁴⁵ Paragraphs 2, 3, 5, and 6 of the Plenary Decision of Supreme Court of the Republic of Latvia No. 2 of 9 December 2021. Available: <https://www.at.gov.lv/lv/jaunumi/par-notikumiem/augstakas-tiesas-plenumu-konstate-butiskus-trukumus-e-lietas-ieviesana-un-lemj-par-pasakumiem-lietu-dalibnieku-interesu-aizsardzibai-10911> [last viewed 15.03.2025].

⁴⁶ *Ņikona, L.* Konstatēti būtiski trūkumi e-lietas ieviešanā [Significant Deficiencies Identified in the Implementation of the e-case]. 14 December 2021. Available: <https://lvportals.lv/tiesas/335784-konstateti-butiski-trukumi-e-lietas-ieviesana-2021> [last viewed 15.03.2025].

⁴⁷ Judgment of the Constitutional Court of the Republic of Latvia of 18 February 2011 in case No. 2010-29-01. Available: https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2016/02/2010-29-01_Spriedums.pdf#search= [last viewed 12.05.2025].

⁴⁸ Guidelines on Democratic Lawmaking for Better Laws. Published by the OSCE Office for Democratic Institutions and Human Rights (ODIHR), 2023. Available: https://www.osce.org/files/f/documents/a/3/558321_3.pdf [last viewed 25.07.2025].

to provide input.⁴⁹ This emphasizes that especially complex and controversial bills should be subject to consultation with sufficient advance notice.

This implies that, in international practice and according to local constitutional case law, the prevailing standard is to conduct consultations before adopting a respective legal norm.

Any amendment to an existing legal norm, or the very idea of a new norm, affects different groups in society whose legal interests often diverge significantly. Yet, the principle of equality requires that every such group, if it so chooses, has the right to defend its interests and to participate in the law-making process in the manner prescribed by law. Every new norm touch upon the rights already held by individuals, including fundamental rights. The Constitutional Court of the Republic of Latvia, on examination, has concluded: “To draft, evaluate and adopt legal regulation that affects the exercise of fundamental rights is, first and foremost, the legislature’s duty. The considerations of private persons should not influence the right and obligation of *Saeima* to decide for itself on legal regulation that concerns the protection, exercise or assurance of other private persons’ fundamental rights.”⁵⁰

Thus, it is the legislature’s task to balance the legal interests of various groups so that everyone’s fundamental rights are protected. Before adopting new legislation, the lawmaker must identify every group whose rights the new norm will affect, weigh those groups’ differing legal interests, and arrive at the solution that, as far as possible, offers the most favourable regulation for everyone concerned. Where society, and the state itself, needs time to adapt to the new rules, transitional provisions must also be prepared.

In the case of the e-case’s introduction (and of the enactment of the instruments governing its operation), however, the entire litigation process was fundamentally affected. By altering every stage of proceedings and the related administrative functions, e.g., filing documents, storing case materials, reviewing them, and so forth, the reform inevitably touched on everyone’s right to a fair trial.⁵¹ Taking the above into account alongside the chronology of the e-case’s rollout, one cannot conclude that the legislature applied the principles of inter-institutional loyalty and good law-making, or that it involved the judiciary in the development of e-case in a timely and effective manner.

Summary

The legislature is obliged both to examine the field that the proposed legislation would modify, including the existing legal landscape, and to hear the individuals or representatives of social groups whose lives the envisaged legal norm will affect. Although state authority is divided, it operates with a single aim – serving

⁴⁹ European Commission for Democracy Through Law (Venice Commission). Compilation of Venice Commission opinions and reports on law-making procedures and the quality of the law. Endorsed by the Venice Commission at its 126th Plenary Session, 19–20 March 2021. Available: [https://www.venice.coe.int/webforms/documents/?pdf=CDL-PI\(2021\)003-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-PI(2021)003-e) [last viewed 25.07.2025].

⁵⁰ Judgment of the Constitutional Court of the Republic of Latvia of 7 October 2009 in case No. 2009-05-01, Paragraph 13.2. Available: https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2016/02/2009-05-01_Spriedums.pdf#search= [last viewed 12.05.2025].

⁵¹ This is a separate issue that requires further study, specifically regarding the concrete risks and experience-based conclusions in the implementation of such projects. However, several factors may affect the application of the right to a fair trial – such as the length of proceedings, public access to digital tools, the public’s digital skills, and others.

the sovereign's interests. All constitutional organs, while performing different tasks, are equal. Thus, the matter is not simply one constitutional body's right to be heard in the legislative process; it is a question of respectful dialogue among constitutional organs, during which the principle of inter-institutional loyalty (derived from the separation-of-powers doctrine) must be honoured.

In general, the legislative authority is obliged to conduct consultations prior to the adoption of legal norms. This obligation arises not only from international standards of democratic lawmaking but also from the case law of the Constitutional Court of the Republic of Latvia. In particular, the principle of inter-institutional loyalty, rooted in the separation of powers doctrine, obliges the legislative authority to engage in consultation with any constitutional organ if the proposed legislation may affect that organ's ability to carry out its constitutional functions. Failure to comply with these procedural obligations, whether by disregarding the requirement to consult the public or by neglecting dialogue with relevant constitutional organs, may result in the adoption of a legal norm that lacks procedural legitimacy and thus undermines its legal validity.

The legislator has a duty to listen to the addressees of the norm by establishing appropriate communication between constitutional bodies; that is, in the present study, a dialogue with the judiciary must be established. Although the political vision for e-case emerged as early as 2011, substantive work began only in 2014 and was administratively fragmented across several ERDF-funded sub-projects. Throughout this period the judiciary was informed sporadically and late: most judges first learned of the programme only in 2021, after procedural-law amendments had already entered into force. All three readings of the platform bill were completed with minimal debate.

The State Audit Office documented the absence of an overarching implementation structure, unclear scope, and fragmented monitoring – concerns echoing those voiced by the Supreme Court of the Republic of Latvia in the extraordinary plenary session on 9 December 2021, which linked the rushed rollout to potential violations of the right to a fair trial.

The evidence demonstrates that the legislature did not fulfil the obligation to “ascertain, hear and evaluate” the views of the legal norms' primary addressees. The principle of inter-institutional loyalty, which requires respectful dialogue and balanced co-operation among constitutional organs, was therefore compromised. The legislative authority has not fulfilled this obligation at all. Therefore, it cannot be assessed whether it has been fulfilled properly, especially considering the implementation chronology of the e-case, as reconstructed based on collected data and analysis of publicly available information in this article.

The study concludes that, the e-case reform was legalised in a manner that fell short of constitutional standards of participatory law-making. To reconcile technological innovation with constitutional fidelity, future reforms should at least (1) mandate early Judicial Council participation in all justice-sector ICT projects; (2) establish a cross-institution steering committee with clear accountability for scope, funding and timelines. These measures would operationalise the principle of mutual loyalty and ensure that popular sovereignty is realised not merely through electoral representation but through an inclusive, transparent and legally certain legislative process.

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<https://doi.org/10.22364/jull.19.07>

Innovation by Design: Strategic Public Procurement and the Normative Case for Public Ownership of IPRs in Open Data Policy¹

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Innovation is widely recognised as a fundamental driver of economic development. As defined by the OECD Oslo Manual, innovation encompasses both an activity and its outcome, referring to new or significantly improved products, processes, or combinations thereof, implemented or made available to users. Innovation activities include the developmental, financial, and commercial efforts that lead to these outcomes.

Within this broader conceptual framework, public procurement and open data policies have gained recognition as key instruments for fostering innovation in the European Union. The Public Procurement Directive urges Member States to make strategic use of public contracts to spur innovation, while the Open Data Directive highlights the role of accessible data in enabling new services and digital transformation. This article examines how these two legal regimes intersect and argues that public ownership of intellectual property rights (IPRs) in data-rich procurement outputs is essential for aligning procurement practices with the EU's innovation and openness goals.

Keywords: open data, procurement, innovation, intellectual property.

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¹ This article was supported by the Estonian Research Council grant (PRG1449).

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Introduction

Innovation is widely recognised as a fundamental driver of economic development, playing a central role in sustaining and enhancing living standards, while also constituting a critical mechanism for addressing complex societal challenges, including climate change, demographic transitions, and public health crises. As defined by the OECD Oslo Manual,

[t]he term ‘innovation’ can signify both an activity and the outcome of the activity. This manual provides definitions for both [...] An innovation is a new or improved product or process (or combination thereof) that differs significantly from the unit’s previous products or processes and that has been made available to potential users (product) or brought into use by the unit (process) [...] Innovation activities include all developmental, financial and commercial activities undertaken by a firm that are intended to result in an innovation for the firm.²

Within this broader conceptual framework, public procurement and open data policies have gained recognition as a significant policy instrument for fostering innovation. This strategic role is expressly acknowledged in the Public Procurement Directive³, where Recital 47 urges public authorities to “make the best strategic use of public procurement to spur innovation” Likewise, Article 1(1) of the Open Data Directive⁴ emphasises the promotion of open data⁵ usage and the stimulation of innovation. In the research literature, it is found that “although open data has been elevated into the directive’s title, replacing PSI [public sector information] in the short name and is recurrent in the preamble, it is rarely mentioned in the substantive provisions”.⁶ This underscores the need to examine whether the Directive’s innovation objectives are operationalised through binding legal mechanisms, such as those

² OECD/Eurostat (2018), Oslo Manual 2018: Guidelines for Collecting, Reporting and Using Data on Innovation, 4th edition, The Measurement of Scientific, Technological and Innovation Activities, OECD Publishing, Paris, 2018, p. 20. <https://doi.org/10.1787/9789264304604-en>

³ Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC. OJ L 94, 28.03.2014, pp. 65–242. Available: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32014L0024&qid=1744014833579> [last viewed 08.04.2025].

⁴ Directive (EU) 2019/1024 of the European Parliament and of the Council of 20 June 2019 on open data and the re-use of public sector information (recast). OJ L 172, 26.06.2019, pp. 56–83. Available: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32019L1024&qid=1744117458782> [last viewed 26.03.2025].

⁵ Article 2(1) of the Data Governance Act defines data as “any digital representation of acts, facts or information and any compilation of such acts, facts or information, including in the form of sound, visual or audiovisual recording”. The analysis in this article adopts this definition as its conceptual foundation. Regulation (EU) 2022/868 of the European Parliament and of the Council of 30 May 2022 on European data governance and amending Regulation (EU) 2018/1724 (Data Governance Act). OJ L 152, 03.06.2022, pp. 1–44. Available: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32022R0868&qid=1712322025563> [last viewed 13.04.2025].

⁶ Broomfield, H. Where is open data in the Open Data Directive? Information Polity, 28, 2023, p. 180. <https://doi.org/10.3233/IP-220053>

relevant to procurement outputs. However, as the literature suggests, “rather than trying to change the law, different kinds of coordinated activities could further improve the possibilities for public procurement of innovation”.⁷

This article examines the role and underlying mechanisms through which public procurement can serve as a catalyst for innovation within the regulatory framework governing open data. The authors argue that public procurement represents not only a significant channel for stimulating demand-driven innovation but also a strategic policy lever capable of advancing the objectives of open data regimes. While general policy recommendations often advocate for the EU Member States to consider leaving intellectual property⁸ ownership with contractors to incentivise innovation, this article takes a contrasting view. It posits that, particularly in the context of open data policies, the strategic acquisition of intellectual property rights (IPRs) by public authorities may be necessary to ensure the accessibility and reusability of data outputs. By aligning procurement practices with open data principles and asserting public ownership over relevant IPRs, contracting authorities can promote greater transparency, support the creation of data-driven services, and facilitate systemic innovation. This policy rationale is further supported by empirical evidence that “organizations putting out tenders to private business to provide R&D for new technologies and services are almost two times more likely to innovate”.⁹ While this reflects an empirical association between procurement engagement and innovation outcomes, the article’s normative position extends further. It asserts that public acquisition of IPRs institutionalises innovation and open access, creating systemic impact beyond individual procurement cycles. This supplier-side understanding echoes broader policy discussions and empirical analyses, where “public procurement is increasingly viewed as having important potential to drive innovation”.¹⁰ On this basis, the central hypothesis advanced in this article is that the acquisition of IPRs by public sector bodies in the context of procurement contracts enhances the effectiveness of open data policies and contributes more robustly to public sector-driven innovation.

This study adopts a doctrinal legal research approach, grounded in the systematic analysis of normative sources within the European Union’s legal and policy framework. Central to the inquiry are the provisions of the Public Procurement Directive and the Open Data Directive, which are examined to elucidate their roles in promoting innovation and shaping the governance of public sector information. These legal instruments are analysed in conjunction with relevant EU policy documents, including communications from the European Commission, and interpretative guidance, which collectively inform the operationalisation of innovation-oriented procurement and open data strategies.

⁷ *Rolfstam, M.* Public procurement as an innovation policy tool: the role of institutions. *Science and Public Policy*, 36(5), 2009, p. 358. <https://doi.org/10.3152/030234209X442025>

⁸ Intellectual property (IP) includes rights resulting from intellectual activity in the industrial, scientific, literary or artistic fields. Article 2 (viii) of the Convention Establishing the World Intellectual Property Organization (as amended on 28 September 1979). Available: <https://www.wipo.int/wipolex/en/text/283854> [last viewed 09.04.2025].

⁹ *Demircioglu, M. A., Vivona, R.* Positioning public procurement as a procedural tool for innovation: An empirical study. *Policy and Society*, 40(3), 2021, p. 388. <https://doi.org/10.1080/14494035.2021.1955465>

¹⁰ *Uyarra, E., Edler, J., Garcia-Estevez, J., Georghiou, L., Yeowa, J.* Barriers to innovation through public procurement: A supplier perspective. *Technovation*, 34, 2014, p. 631. <https://doi.org/10.1016/j.technovation.2014.04.003>

The research further incorporates a comprehensive review of academic literature across the fields of public procurement law, intellectual property law, innovation policy, and open government data. This engagement with interdisciplinary scholarship facilitates a broader understanding of the legal, policy, and institutional dimensions of innovation within the EU's regulatory environment.

The analytical framework is primarily based on traditional legal methods, including legal interpretation, normative analysis, and contextualisation within the broader legal system. These methods are employed to examine the coherence and effectiveness of the regulatory instruments under review, with a particular focus on the extent to which the legal framework enables the public sector to act as a driver of innovation. Special attention is given to the legal treatment of intellectual property rights in procurement contracts, and the implications of IPR ownership for achieving open data policy objectives.

While the study does not engage in a comparative analysis of Member State practices, it offers a normative and conceptual evaluation of the legal architecture at the intersection of public procurement, open data, and innovation. The analysis critically examines the policy rationale for public sector ownership of intellectual property rights within this framework.

This article seeks to answer the question: under what legal and policy conditions should public authorities acquire intellectual property rights in procurement contracts to ensure alignment with open data policies and to enhance their role as innovation drivers?

The authors used OpenAI's ChatGPT and Grammarly to assist in articulating their ideas more clearly and enhancing the overall communicative effectiveness of the text. However, all substantive arguments, analytical insights, and conclusions remain solely the product of the authors' independent research and critical reasoning.

1. Strategic role of public procurement and open data in EU innovation policy

1.1. Legal and policy foundations

Innovation occupies a central and enduring position in the European Union's legal and policy architecture. It is not merely treated as a sector-specific priority, but rather as a cross-cutting objective that underpins the EU's long-term strategies for economic growth, digital transformation, and societal resilience. At the strategic level, the Europe 2020 Strategy¹¹ identified "smart growth" – defined as growth driven by knowledge and innovation – as one of its three main pillars (together with sustainable and inclusive growth). More recently, the New European Innovation Agenda (2022) reaffirmed the Union's ambition to strengthen its global position in deep-tech innovation and to foster a more inclusive, interconnected, and mission-oriented innovation ecosystem.¹²

¹¹ Europe 2020. A strategy for smart, sustainable and inclusive growth. COM/2010/2020 final. Available: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52010DC2020> [last viewed 09.04.2025].

¹² Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. A New European Innovation Agenda. COM/2022/332 final. Available: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52022DC0332> [last viewed 09.04.2025].

This policy trajectory resonates with the understanding of innovation advanced in the OECD Oslo Manual, which defines innovation as comprising

*Key components of the concept of innovation include the role of knowledge as a basis for innovation, novelty and utility, and value creation or preservation as the presumed goal of innovation. The requirement for implementation differentiates innovation from other concepts such as invention, as an innovation must be implemented, i.e. put into use or made available for others to use.*¹³

These understanding positions innovation not simply as a novel idea or technological breakthrough, but as a process through which knowledge is translated into practical, value-generating applications.

In parallel, the EU has recognised the critical role of data as an enabler of innovation. The European Strategy for Data explicitly states that “Europe should offer an environment that supports data-driven innovation and stimulates demand for products and services that rely on data as an important factor of production”.¹⁴ This framing reinforces the importance of legal and institutional mechanisms that ensure access to, and re-use of, public sector data as part of a broader strategy to support innovation ecosystems.

Taken together, these developments reflect a coherent legal and policy trajectory in which innovation is promoted not in isolation, but in conjunction with other strategic goals – particularly digitalisation, open government, and economic competitiveness. The subsequent sections examine how this integrated approach is operationalised through the legal frameworks governing public procurement and open data, and how the ownership and allocation of intellectual property rights within these frameworks may either advance or hinder the EU’s innovation objectives.

1.2. Innovation as a cross-cutting objective in procurement

Public procurement is increasingly recognised as a strategic tool within the EU’s broader innovation agenda.¹⁵ The Proposal for a Directive on public procurement identifies two complementary objectives: enhancing public spending efficiency and supporting societal goals, including innovation.¹⁶ The Public Procurement Directive provides the main legal framework for awarding public contracts across the EU and explicitly affirms procurement’s role in advancing innovation-driven objectives. In alignment with the goals of the Europe 2020 Strategy, Recital 47 of the Directive underscores that “research and innovation, including eco-innovation and social innovation, are among the main drivers of future growth and have been put at the centre of the Europe 2020 strategy for smart, sustainable and inclusive

¹³ OECD/Eurostat 2018, Oslo Manual 2018: Guidelines for Collecting, Reporting and Using Data on Innovation, 4th edition, The Measurement of Scientific, Technological and Innovation Activities, OECD Publishing, Paris, 2018, p. 20. <https://doi.org/10.1787/9789264304604-en>

¹⁴ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. A European strategy for data. COM/2020/66 final. Available: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020DC0066> [last viewed 08.04.2025].

¹⁵ For further discussion on public procurement and innovation, see Kundu, O., James, A. D., Rigby, J. Public procurement and innovation: a systematic literature review. Science and Public Policy, 47(4), 2020, 490–502. <https://doi.org/10.1093/scipol/scaa029>

¹⁶ Proposal for a Directive of the European Parliament and of the Council on Public Procurement. COM/2011/0896 final. Available: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52011PC0896> [last viewed 09.04.2025].

growth” and calls on contracting authorities to make “the best strategic use of public procurement to spur innovation”.¹⁷ This commitment is translated into concrete procedural mechanisms designed to facilitate the development and uptake of innovative solutions. Article 31 introduces the innovation partnership,¹⁸ a tailored procurement procedure that enables contracting authorities to engage with economic operators in the co-development and subsequent acquisition of goods, services, or works that are not yet available on the market. Furthermore, the Directive promotes a shift from price-based evaluation to value-based assessment. Article 67 endorses the use of the most economically advantageous tender criterion, which allows public authorities to include innovation-related considerations in their award decisions. These provisions collectively embed innovation as a legitimate and desirable objective of public purchasing, enabling contracting authorities to act as demand-side drivers of technological and organisational advancement.

The integration of innovation into procurement law represents a deliberate policy move towards strategic procurement, whereby public sector expenditure is aligned with broader economic and societal goals. This alignment can extend beyond efficiency gains toward actively fostering innovation ecosystems, particularly by shaping lead markets through early public demand. As noted in the literature, “the state can through the size or the peculiarities of public demand itself act as a lead user initiating lead markets”.¹⁹ This understanding aligns with the view that public procurement, “if directed wisely could significantly boost supplier-side innovation”.²⁰ This approach is particularly significant in domains characterised by complex, evolving needs – such as climate adaptation, digital transition, and public health resilience – where traditional procurement mechanisms may fall short in delivering transformative outcomes. As such, the Public Procurement Directive provides a legal foundation for the public sector to engage more actively in shaping innovation trajectories, particularly when coordinated with parallel instruments such as the Open Data Directive.

1.3. Open data and data governance in the digital economy

In parallel with the evolution of procurement law, the European Union has established a complementary regulatory framework aimed at facilitating the re-use of public sector information as a catalyst for data-driven innovation. The Open Data Directive marks a significant development in the EU’s approach to digital governance.

¹⁷ Article 2(22) of the Public Procurement Directive defines innovation as “the implementation of a new or significantly improved product, service or process, including but not limited to production, building or construction processes, a new marketing method, or a new organisational method in business practices, workplace organisation or external relations *inter alia* with the purpose of helping to solve societal challenges or to support the Europe 2020 strategy for smart, sustainable and inclusive growth”.

¹⁸ Recital 49 of the Public Procurement Directive states that where existing market solutions cannot meet the need for an innovative product, service, or works, contracting authorities should be able to use a specific procedure. This allows for the establishment of a long-term innovation partnership for the development and subsequent purchase of the innovation, provided it meets agreed performance levels and costs, without requiring a separate procurement procedure.

¹⁹ Edler, J., Luke Georghiou, L. Public Procurement and Innovation – Resurrecting the Demand Side. Research Policy, 36, 2007, p. 956. <https://doi.org/10.1016/j.respol.2007.03.003>

²⁰ Rolfstam, M. Public procurement, p. 349.

It reflects a normative shift towards recognising public data as a strategic asset, central to the functioning of the digital economy and the development of new technologies.

The Directive's stated objective, set out in Article 1(1), is to establish "a set of minimum rules governing the re-use and the practical arrangements for facilitating the re-use of existing documents held by public sector bodies," with a clear emphasis on promoting the use of open data for the creation of innovative services and applications. This is further reinforced through the introduction of the category of high-value datasets²¹, which must be made available in machine-readable formats, free of charge, and under open licences. These datasets, identified for their significant potential in generating socio-economic value, are intended to stimulate downstream innovation, particularly in high-growth sectors such as artificial intelligence²² (AI), transport, and environmental monitoring.

The Directive's innovation-oriented rationale is explicitly articulated in its recitals. Recital 16 highlights the re-use of public data as a driver of new products and services, especially within the digital single market. The Directive underscores the added value of data held by public undertakings, noting its potential as an input for innovation and economic development. In this way, the Open Data Directive situates legal access to public sector information within a broader strategic framework aimed at enhancing competitiveness, fostering technological advancement, and enabling systemic innovation across Member States. As has been critically observed, "the directive is an instrument to promote the re-use of open data rather than regulating open data *per se*".²³ This distinction clarifies why legal control over outputs (e.g., through IPR ownership) remains necessary for realising the directive's innovation potential.

Taken together, these provisions reflect a deliberate legal effort to align data governance with the Union's innovation agenda. When considered alongside the Public Procurement Directive, the Open Data Directive contributes to a legal architecture in which public sector instruments are mobilised not merely for administrative efficiency, but for broader innovation policy objectives. The effectiveness of this framework, however, depends on the extent to which legal barriers – particularly those related to intellectual property rights – can be addressed in a manner that supports the accessibility and re-usability of publicly funded outputs. This, in turn, presupposes that public procurement processes are structured around clearly defined innovation objectives and well-matched legal instruments. As emphasised in the literature, "the objectives, that is, obstacles to innovation that need to be overcome, must be clearly defined upfront in the public procurement process and that public

²¹ Article 2(10) of the Open Data Directive defines 'high-value datasets' as "documents the re-use of which is associated with important benefits for society, the environment and the economy, in particular because of their suitability for the creation of value-added services, applications and new, high-quality and decent jobs, and of the number of potential beneficiaries of the value-added services and applications based on those datasets".

²² Article 3(1) of the Artificial Intelligence Act defines AI system as "a machine-based system that is designed to operate with varying levels of autonomy and that may exhibit adaptiveness after deployment, and that, for explicit or implicit objectives, infers, from the input it receives, how to generate outputs such as predictions, content, recommendations, or decisions that can influence physical or virtual environments". 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). OJ L, 2024/1689, 12.07.2024. Available: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32024R1689&qid=1744212517362> [last viewed 08.04.2025].

²³ *Broomfield, H.* Where is open data, p. 181.

procurers must consider which are the appropriate instruments”.²⁴ This underscores the need for procurement law to function not merely as a regulatory framework, but as a tool of strategic design tailored to innovation system conditions. In this regard, promoting the actual use of open data – not merely its availability – emerges as a core requirement for realising innovation and public value. As has been noted in the literature, “stimulating the use of open data should be part of open data policies, as this is a crucial factor for achieving the positive effects of open data”.²⁵

The relationship between public procurement and open data becomes especially relevant when procurement processes generate data-rich outputs, such as software, datasets, or technical documentation. These outputs often hold significant potential for downstream innovation, particularly in data-intensive sectors like artificial intelligence, public health, and environmental sustainability. However, a key obstacle to their re-use arises from the legal treatment of intellectual property rights (IPRs) in public contracts. Under prevailing practice, IPRs typically remain with the contractor unless otherwise specified, a model intended to incentivise private-sector innovation.

This approach, however, creates a structural tension between the commercial logic of contractor-held IPRs and the public interest in open access to publicly funded information. It has been argued that “there is a risk that open data will simply be appropriated, impact and transform our conceptual understanding of the meaning of open data, and constrain the possibilities for promoting and entrenching legally ideas of citizen participation”.²⁶ This reinforces the argument that legal frameworks – particularly in procurement – must proactively preserve the participatory and public value dimension of open data. While private ownership may facilitate market dissemination, it can also limit access to outputs – particularly high-value datasets or digital tools – produced with public funds. The institutional orientation toward risk minimisation often leads to cautious data policies that conflict with the goals of openness and reusability. As identified in comparative analysis, “organizations that develop an open data policy but mainly focus on the risks of becoming open remain more closed in their open data policy than the organizations that develop an open data policy because they aim to become more open”.²⁷ This misalignment is especially problematic where the public sector is both the funder and intended beneficiary of such outputs.

The issue is particularly acute under the Open Data Directive, which mandates the availability and re-use of high-value datasets. If such datasets are generated through procurement but encumbered by proprietary rights, their accessibility may be restricted, undermining the Directive’s objectives. Scholarly commentary emphasises that “datasets suitable for economic value creation can differ significantly from those that stimulate and facilitate citizen participation”.²⁸ This observation supports the concern that procurement-generated data may be deprioritised unless public control ensures alignment with open data principles. Moreover, contractor-held IPRs can impede transparency and accountability, especially when algorithms or digital

²⁴ Chicot, J., Matt, M. Public procurement of innovation: a review of rationales, designs, and contributions to grand challenges. *Science and Public Policy*, 45(4), 2018, pp. 490–491. <https://doi.org/10.1093/scipol/scy012>

²⁵ Zuiderwijk, A., Janssen, M. Open data policies, their implementation and impact: A framework for comparison. *Government Information Quarterly*, 31(1), 2014, p. 28. <https://doi.org/10.1016/j.giq.2013.04.003>.

²⁶ Broomfield, H. Where is open data, p. 176.

²⁷ Zuiderwijk, A., Janssen, M. Open data policies, p. 22.

²⁸ Broomfield, H. Where is open data, p. 184.

tools are deployed in public services but shielded from scrutiny due to commercial confidentiality.

Both the Public Procurement Directive and the Open Data Directive endorse innovation as a policy goal, yet neither provides a coherent legal framework for reconciling IPR ownership with data re-use obligations. Current guidance often recommends leaving IPRs with contractors “where appropriate”, but lacks clarity on when public acquisition is necessary to serve open data and innovation objectives. The result is a fragmented regulatory environment that risks frustrating its own aims by failing to ensure the long-term accessibility and re-usability of publicly funded outputs.

In this context, the effective integration of procurement law and open data policy depends not only on procedural alignment, but also on substantive legal coherence regarding IPR ownership and control.

Indeed, the literature points out that the Procurement Directive “does not by itself clarify how intellectual property rights should be divided between a contracting authority and a contractor”.²⁹ The following section develops a normative argument in favour of greater public sector control over IPRs in innovation-oriented procurement contracts, with a view to strengthening the accessibility, re-usability, and societal value of publicly funded outputs.

2. Intellectual property rights in procurement: Legal discretion and policy trade-offs

This section develops the normative argument for greater public control over IPRs through three dimensions: (1) the scope of legal discretion afforded by EU procurement law; (2) the underlying public interest justifications; and (3) the practical implementation of IPR strategies that balance public and private interests.

2.1. Contractual autonomy under the Procurement Directive

The Public Procurement Directive affords contracting authorities significant discretion in determining the allocation and management of intellectual property rights (IPRs) within the framework of procurement procedures. Article 31(6) provides that “in the procurement documents, the contracting authority shall define the arrangements applicable to intellectual property rights,”³⁰ while Article 42(1) permits technical specifications to indicate whether the transfer of such rights will be required. While these provisions establish a formal basis for regulatory autonomy, they offer limited normative guidance on how IPRs should be treated in innovation-oriented procurement contexts, particularly where such outputs intersect with open data mandates. The absence of a harmonised approach has resulted in divergent interpretations of the appropriate locus of ownership. As has been noted in

²⁹ Caranta, R., Gomes, P. C. Public procurement and innovation. *ERA Forum*, 22, 2021, p. 382. <https://doi.org/10.1007/s12027-021-00674-6>

³⁰ The same principle is repeated in other public procurement directives as well. See Article 49(6) of the Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC. *OJ L 94*, 28.03.2014, pp. 243–374. Available: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32014L0025&qid=1744096575447> [last viewed 8.04.2025].

the literature, “the confusion in the PSI Directive³¹ was found to work in favour of citizen participation but given the importance of government data to feed the data economy, this is unlikely to still be the case”.³² This highlights the importance of clear procurement strategies for IPRs, to ensure that public value and openness do not get eclipsed by purely economic imperatives.

2.2. Public interest justifications for IPR ownership

The public interest rationale for public IPR ownership merits closer examination. On one side of the debate, it is argued that, given the public financing of innovation through procurement, the resulting intellectual property should be openly accessible to serve the wider public interest. As one expert formulation suggests, “since the contracting authority – the public sector in general – is paying, there is an argument to say that intellectual property should be shared with everyone”.³³ On the other hand, prevailing policy instruments emphasise the value of private-sector ownership in incentivising commercialisation. The European Commission’s communication “Making the most of the EU’s innovative potential” emphasises the need to improve the conditions under which companies can protect and exploit intellectual property in the context of public procurement, with the aim of stimulating innovation and strengthening the broader economy. To this end, it recommends that “Member States should consider leaving IP ownership to the contractors where appropriate, unless there are overriding public interests at stake or incompatible open licensing strategies in place”.³⁴

There are circumstances in which the acquisition of intellectual property rights (IPRs) by public authorities is justified based on overriding public interest. This is acknowledged in academic literature, which notes that

*there can be exceptional cases in which the protection of overriding public interests (such as national security) require a restriction on the uses of the IP rights and know-how related to public procurement activities and the subject matter of those contracts,*³⁵

while also cautioning that such exceptions must be interpreted narrowly and typically arise in the context of defence procurement. However, the present article contends that the scope of public interest capable of justifying public ownership or control over IPRs should be understood more broadly, particularly in light of the objectives of open data policies and innovation governance.

Where procurement generates data-rich outputs – such as technical documentation, software, or high-value datasets – the public interest extends beyond traditional security considerations to encompass goals such as transparency, accessibility, and

³¹ Directive 2003/98/EC of the European Parliament and of the Council of 17 November 2003 on the re-use of public sector information. OJ L 345, 31.12.2003, pp. 90–96. No longer in force, date of end of validity: 16 July 2021. Available: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32003L0098&qid=1744797668686> [last viewed 16.04.2025].

³² Broomfield, H. Where is open data, p. 186.

³³ Caranta, R., Gomes, P. C. Public procurement, p. 384.

³⁴ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Making the most of the EU’s innovative potential. An intellectual property action plan to support the EU’s recovery and resilience. COM/2020/760 final, p. 10. Available: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52020DC0760> [last viewed 07.04.2025].

³⁵ Sanchez-Graells, A. Public Procurement and the EU Competition Rules. 2nd edition. Hart Publishing, 2015, p. 449.

the promotion of systemic innovation. The Guidance on Innovation Procurement explicitly acknowledges that “leaving intellectual property rights ownership with suppliers can fuel the industrial commercialisation of innovative solutions while fully protecting the reasonable interests of public buyers and reducing the procurement cost for the public sector”.³⁶ However, the guidance also highlights the strategic advantages of public ownership. If the public buyer retains IPRs, it can build on the results of research and development in future procurement procedures, and to license these rights to third parties free of charge “with the objective of stimulating further innovation,” including terms requiring that subsequent innovations remain openly available.

2.3. Institutional strategies for balanced IPR allocation

The successful implementation of this model depends on appropriate procedural and contractual mechanisms. The literature further supports a more nuanced approach to IPR allocation in innovation procurement. Empirical and conceptual studies highlight that firms with a strong R&D orientation are particularly sensitive to how intellectual property rights are managed in procurement settings. In addition, earlier strands of innovation research have stressed the relevance of demand-side policy instruments in addressing systemic failures that hinder innovation. As synthesised in prior research, “user-producer interaction and communication is often poor, with scattered demand not articulated sufficiently to make suppliers read the signals and translate them into innovations”.³⁷ As has been assumed in the literature, “a poor management of IPR would be perceived as a strong barrier by certain suppliers, particularly those more committed to R&D and innovation”.³⁸ It has been observed that “the transmission of IP rights can be instrumented in a non-distorting manner by recourse to non-exclusive or other types of limited licences that allow the contractor to retain ownership and full use of the technology concerned, while also permitting the contracting authority to develop certain activities”.³⁹ Such hybrid licensing arrangements can preserve contractor incentives while enabling the public sector to ensure continuity and openness in innovation. However, legal and contractual mechanisms alone are not sufficient; they must be situated within an institutional culture that treats data openness as a systemic default rather than a policy exception. Legal instruments must thus be embedded within a wider procurement rationale that aligns procurement activities with the transformative goals. Embedding such legal strategies in a truly innovation-oriented procurement culture requires procedural rethinking within contracting authorities. A relevant example can be found in the case of circular public procurement (CPP), where legal and procedural innovation serve broader sustainability objectives. As noted in the literature, “CPP [circular public procurement] holds a transformative potential in encouraging contracting authorities to implement innovative procedures, thereby advancing the objectives of a CE [circular economy]”.⁴⁰ This illustrates how procurement design can simultaneously

³⁶ Commission Notice – Guidance on Innovation Procurement. OJ C 267, 06.07.2021, pp. 1–72. Available: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.C_.2021.267.01.0001.01.ENG&toc=OJ%3AC%3A2021%3A267%3ATOC [last viewed 07.04.2025].

³⁷ Edler, J., Luke Georghiou, L. Public Procurement and Innovation, p. 956.

³⁸ Uyarra, E., Edler, J., Garcia-Estevez, J., Georghiou, L., Yeowa, J. Barriers to innovation, p. 634.

³⁹ Sanchez-Graells, A. Public Procurement, p. 449.

⁴⁰ Grimbert, S. F., Zabala-Iturriagaogitia, J. M. Closing the loop without reinventing the wheel: public procurement for innovation promoting a circular economy. *Science and Public Policy*, 51, 2024, p. 495. <https://doi.org/10.1093/scipol/scad084>

advance sector-specific goals while also prompting institutional innovation within public administrations.

More broadly, innovation procurement has been conceptually linked to the deliberate transformation of public service delivery systems. As some researchers argue, “transformational PPI [public procurement of innovation] is a means adopted by public organisations to try to transform systems. Their deliberate objective is to develop new products or services and to diffuse them to society”.⁴¹ To realise this potential, however, legal design must be accompanied by institutional cultures that are receptive to openness, reuse, and experimentation. One important mechanism in this regard is market intermediation, which enables iterative learning and participatory needs assessment throughout the procurement process. As highlighted in recent scholarship, “intermediated market dialogue thus becomes a space for experimentation, risk-taking, and learning, ultimately leading the contracting authority to rethink its needs”.⁴² Such practices not only reduce innovation-related risks but also support flexible procurement frameworks that are better suited to dynamic legal and policy environments. Crucially, these procedural mechanisms must be underpinned by a broader cultural commitment to openness and knowledge sharing. As emphasised in the literature, “to implement open data policies and to achieve goals such as economic growth, innovation and transparency, a culture has to be developed in which publicizing data is considered the de facto standard. Ideally, a culture of openness should exist in which open data policies are a standard part of all working processes and data”.⁴³ This cultural infrastructure is essential to ensure that public ownership or access to IPRs actually translates into public value through practical reuse, continuity, and diffusion of innovation.

Moreover, in cases where intellectual property rights (IPRs) are retained by the supplier, the Guidance on Innovation Procurement underscores the importance of mitigating competitive distortions through careful contractual design. It specifies:

if the public buyer decides to leave the new intellectual property rights resulting from the research and development contract with the supplier, technical specifications should reflect such distribution of intellectual property rights, in particular the market value of the rights left with the supplier in order to avoid potential distortion of competition”. It further states that “the public buyer may foresee to use those rights to implement the solution and/or require the supplier to license those rights to third parties in certain situations under fair (open, transparent and non-discriminatory) and reasonable market conditions.

These provisions illustrate the flexibility of the existing legal framework, allowing contracting authorities to assert various degrees of control over IPRs when doing so serves broader policy objectives.

This flexibility is particularly relevant in light of the structural limitations imposed by existing intellectual property⁴⁴ regimes on the implementation of open

⁴¹ Chicot, J., Matt, M. Public procurement, p. 485.

⁴² Grimbert, S. F., Zabala-Iturriagoitia, J. M. Closing the loop, p. 495.

⁴³ Zuiderwijk, A., Janssen, M. Open data policies, p. 28.

⁴⁴ Recital 54 of the Open Data Directive clarifies that, for the purposes of the Directive, the term ‘intellectual property rights’ refers exclusively to copyright and related rights, including *sui generis* database rights.

data policies. Recital 28 of the Open Data Directive underscores that “legitimate commercial interests, such as trade secrets, and to intellectual property rights of third parties should be duly taken into account, according to the principle ‘as open as possible, as closed as necessary’”. Article 1(2)(c) explicitly excludes from its scope documents over which third parties hold IPRs. Consequently, where public procurement generates data-rich or innovation-based outputs, the *ex-ante* acquisition of IPRs by contracting authorities emerges as a critical legal mechanism to ensure that such outputs are governed in accordance with open data principles and made available for reuse.

In this light, and consistent with the hypothesis advanced in this article, the strategic acquisition or control of IPRs by public sector bodies should not be regarded as incompatible with public procurement, but rather as an essential legal and policy tool for ensuring that publicly funded outputs remain accessible, reusable, and capable of generating long-term societal value. The public interest in this context is not limited to exceptional cases, such as national security, but extends to the structural alignment of procurement and data governance with broader Union goals concerning transparency, economic resilience, and digital innovation.

That said, the presence of a public interest in advancing innovation through open data initiatives does not negate the importance of ensuring balanced contractual arrangements. As highlighted in the research literature,

*public contractors should not be obliged to accept terms and conditions regarding the transfer of their IP and know-how that are more restrictive than the terms applied in regular market transactions - unless there is an overriding justification in the public interest and, if so, the transfer of additional rights is duly compensated so as to prevent a devaluation of the value of the technology for its original owner.*⁴⁵

Such calibration could involve hybrid models, such as time-limited exclusive rights, tiered access conditions, or negotiated licensing schemes, which preserve contractor incentives while maintaining pathways for public access and innovation continuity. This observation underscores the need for a calibrated legal approach that reconciles the legitimate interests of both public authorities and private contractors, ensuring that public value is maximised without distorting the market or undermining innovation incentives.

In parallel with the legal frameworks governing open data and public procurement, the Data Governance Act (DGA) introduces a complementary mechanism for facilitating the re-use of protected public sector data, including outputs from procurement contracts subject to intellectual property rights. While the Open Data Directive applies only to accessible public documents, the DGA – under Article 3(1) (c) – extends re-use possibilities to non-open data, offering structured access through mechanisms such as secure processing environments.⁴⁶ It thereby provides an alternative route to enable innovation where public authorities have not secured full IPR ownership.

Nonetheless, the DGA remains grounded in a post-contractual governance model, dependent on procedural safeguards and technical infrastructure rather than

⁴⁵ Sanchez-Graells, A. Public Procurement, p. 450.

⁴⁶ Article 2(20) of the Data Governance Act defines a secure processing environment as a physical or virtual setting designed to ensure compliance with Union and national law, particularly concerning intellectual property rights, confidentiality, and data processing controls.

structural control over rights. Article 5(7) requires full respect for existing IPRs,⁴⁷ and Recitals 15 and 19 stress that re-use must preserve the interests of rights holders and public trust. While such provisions help prevent legal barriers to innovation, they do not guarantee meaningful public access or re-usability.

Accordingly, and consistent with the central hypothesis of this article, the DGA should not be seen as a substitute for the proactive legal strategy of embedding data access and re-use rights directly into procurement contracts. It has been observed that “implementing the principles outside of this context is likely more conducive to feeding companies operating in the data economy”.⁴⁸ This underscores why IPR strategies must be embedded within procurement frameworks if the aim is to safeguard the democratic and innovation-oriented reuse of public data. Rather, it reinforces the normative argument that public ownership or control of IPRs remains essential for ensuring that publicly funded innovation outputs are accessible, reusable, and aligned with broader Union objectives for open data and digital transformation.

Summary

This article explores the ways how public procurement can serve as a strategic legal and policy tool to advance open data governance and stimulate innovation in the European Union. Situated at the intersection of procurement law, intellectual property law, and innovation policy, the article argues that contracting authorities should play a more active role in shaping innovation trajectories by acquiring intellectual property rights (IPRs) in publicly funded procurement outputs. The analysis demonstrates that practices of leaving IPRs with contractors may undermine the objectives of the Open Data Directive, particularly where procurement generates data-rich outputs of high public value. Through doctrinal analysis of the Public Procurement and Open Data Directives, the article shows that EU law affords formal flexibility on IPR allocation but lacks substantive guidance for aligning procurement with open data objectives.

Responding to this normative gap, the article argues for a recalibration of procurement strategies that embeds data accessibility and reusability directly into contract design. It proposes that public ownership or control of IPRs – far from stifling innovation – can institutionalise openness, support democratic data use, and maximise the societal value of publicly funded outputs. The article identifies legal mechanisms, such as non-exclusive licensing and hybrid ownership models, that can balance public interest with supplier incentives. It concludes that the effectiveness of innovation-oriented procurement depends not only on legal instruments but also on institutional cultures oriented toward openness, participation, and learning. In this light, procurement is recast as a legally empowered site of innovation by design, where governance choices shape inclusive and transparent innovation ecosystems across Member States.

⁴⁷ Article 5(7) of the Data Governance Act provides that the re-use of data is permitted only in compliance with applicable intellectual property rights. At the same time, it clarifies that public sector bodies may not invoke the *sui generis* database right to obstruct or restrict re-use.

⁴⁸ *Broomfield, H.* Where is open data, p. 186.

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<https://doi.org/10.22364/jull.19.08>

The Scope and Boundaries of the Parliamentary Inquiry According to the Latvian Constitutionalism

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Parliamentary inquiry is one of the oldest and most widely used tools of parliamentary control. Since the Declaration of Independence of the Republic of Latvia, parliamentary inquiry has been a central instrument in parliamentary oversight, with its potential impact on the public sector being significant. The evolution of parliamentarism and constitutionalism has led to a deeper understanding of the need for efficient parliamentary control, which has resulted in the modification of various forms of oversight tools. Nevertheless, contemporary legal literature often prioritizes the legality of control exercised by the judiciary, rather than the effects of parliamentary control, which is typically viewed as a means of political oversight. However, parliamentary control, especially parliamentary inquiry, is a vital element of a democratic society, without which an adequate level of transparency and checks and balances cannot be maintained. Given the broad discretion of parliament, the scope and boundaries of parliamentary inquiry affect not only the political opposition but also all subjects that may be subjected to parliamentary investigation.

Keywords: parliamentary inquiry, parliamentary control, corollary theory, theory of essentially, checks and balances, constitutionalism.

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1. Parliamentary inquiries as a tool of parliamentary control

Parliamentary control is one of the most essential functions of modern parliaments in democratic societies. While contemporary legal literature predominantly focuses on legal oversight exercised by judicial and quasi-judicial institutions, parliamentary control remains a crucial component of the system of checks and balances. It enables parliaments to address issues not only within the government but also beyond it, through both political and legal mechanisms.¹ Instruments of parliamentary control – such as votes of no confidence, impeachment proceedings, the dismissal of public officials, and budgetary oversight – fundamentally depend on Members of Parliament (hereinafter – MP) having access to relevant information.

There are various ways to categorize the instruments of parliamentary control, depending on their objectives, the impact on the addressee, and the nature of their consequences. Parliamentary control is traditionally regarded as a form of political oversight. However, its legal dimension is increasingly acknowledged in both theory and practice. For example, a vote of no confidence constitutes a purely political tool, as parliament is not legally constrained in its decision on whether the government should remain in office. In contrast, instruments such as impeachment or the removal of public officials for negligence or unlawful conduct fall within the scope of legal control, as such actions are governed by specific legal standards and procedures.² In both cases, parliament plays a crucial role in upholding the stability and integrity of both the political and legal systems.

Parliamentary control should not be regarded as a secondary function of the legislature. In contemporary parliamentary democracies, the formal legislative process takes place within the parliament, however, the majority of legislative initiatives originate from the government.³ Given the political alignment between the executive and the parliamentary majority, such proposals are often approved with minimal resistance. In this context, parliamentary control emerges as a core function of the legislature, serving as a crucial mechanism for ensuring the political and legal accountability of public officials.⁴ Conversely, ineffective parliamentary oversight may result in the concentration of political power in the hands of the parliamentary majority's leadership and the government it supports, thereby weakening democratic checks and balances.

¹ Balodis, R. (ed.). *Parlamentārā izmeklēšana Latvijas Republikā. 1. Parlaments. Parlamentārā kontrole* [Parliamentary Investigation in the Republic of Latvia 1. Parliament. Parliamentary Control]. Rīga: Latvijas Vēstnesis, 2016, p. 56.

² *The Constitution of the Republic of Latvia – 100. Collection of research papers of the 80th International Scientific Conference of the University of Latvia*. Rīga: LU Akadēmiskais apgāds, 2022, p. 409.

³ It should be noted that the structure of the parliament (unicameral or bicameral) plays a major role in the issue of parliamentary control. In bicameral parliaments, it is the upper houses that have the prerogative to conduct parliamentary investigations, as they have the final say in matters of parliamentary control. In unicameral parliaments, in conditions where the government's work in creating new bills is increasing, the role of parliament as the primary legislator is changing. The unicameral parliament becomes a kind of "second house", basically amending the bills already prepared by the government.

⁴ Griglio, E. *Parliamentary Oversight of the Executives. Tools and Procedures in Europe*. Oxford: Hart Publishing, 2020, p. 4.

Comparative analysis shows that parliamentary control can effectively ensure public officials' accountability. However, its success depends on MPs having sufficient access to relevant information, which is a fundamental prerequisite for informed oversight and the effective operation of parliamentary scrutiny mechanisms.⁵ Before discussing parliamentary inquiry, it should be noted that it is also carried out by parliamentary committees. Several committees in the Latvian Parliament (for example, the National Security Committee, the European Affairs Committee) are not legislative in nature, but rather have the task of parliamentary control. These committees primarily serve oversight functions rather than legislative ones, focusing on hearings with experts and officials. In addition to the above, traditional legislative committees (for example, the Legal Committee) also deal with executive control by reviewing specific bills and their amendments.

In a parliamentary democracy, MPs traditionally have at least three primary means of obtaining information: parliamentary questions, interpellations, and inquiries. The Constitution of the Republic of Latvia (hereinafter – *Satversme*)⁶ provides for all three mechanisms as tools available to MPs. While the parliamentary majority typically has access to information through direct channels with the government and its officials, the opposition must rely on these informational tools of parliamentary control to exercise effective oversight. The majority is tasked with safeguarding the coalition, while the opposition often displays a natural antagonism toward it. As a result, the opposition tends to focus closely on the government's mistakes and critiques them. At the same time, these institutions of parliamentary control generally enshrined in the Constitution have been significantly limited over time by the Parliament of the Republic of Latvia (hereinafter – *Saeima*), which has gradually neutralized them. Of course, every question or request is a difficult task for those in power, but in practice, oral answers to questions have become less valuable due to their regulation in the Rules of Order of the *Saeima*, while all requests are rejected without exception. It should also be said about interpellations that for the last twenty years they have been “neutralized” in coalition agreements, in which parties undertake to reject them.

The purpose of informative parliamentary control is rooted in the principle of the separation of powers, aiming to address the executive's privileged access to information. As the executive possesses key resources and maintains direct contact with the public, effective parliamentary oversight – mainly driven by the opposition – requires access to such information. Therefore, the functionality of informative control tools is essential for ensuring meaningful oversight and maintaining an effective system of checks and balances.

Informative parliamentary control, in itself, does not lead to any direct legal consequences. As it is widely recognized in Latvian as well as Western legal doctrine, parliamentary inquiry cannot serve as an alternative of judicial proceeding.⁷ However, the publicity surrounding such control mechanisms can result in significant political consequences.

⁵ Meijer, A. J. Transparent government: Parliamentary and legal accountability in an information age. *Information Polity*, Vol. 8, No. 1 & 2, 2003, pp. 67–68.

⁶ Latvijas Republikas Satversme [The Constitution of the Republic of Latvia] (15.02.1922). Available: <https://likumi.lv/ta/id/57980-latvijas-republikas-satversme> [last viewed 07.04.2025].

⁷ Balodis, R. (ed.). *Latvijas Republikas Satversmes komentāri. II nodaļa. Saeima* [Commentary to the Constitution of the Republic of Latvia. Chapter II. *Saeima*]. Rīga: Latvijas Vēstnesis, 2020, p. 425.

Through informative parliamentary control, the parliament functions as a public forum where the requested information is not only provided to MPs but also discussed in an open and transparent manner. The sovereign – the People – are not merely passive observers of this process, since they are also empowered to learn about facts that may reveal potential misconduct by the executive or other public officials. Consequently, the public may not only politically align with the parliamentary opposition but also exercise democratic control by voting out the current parliamentary majority in the next elections.⁸ In this context, the Latvian constitutional system is unique, as Article 14 of the *Satversme* grants one-tenth of the electorate the right to initiate a national referendum on the recall of the *Saeima*. Accordingly, if the Latvian parliamentary opposition, through the use of informative parliamentary control, brings to light significant facts indicating misconduct within the public sector, the people of Latvia are empowered not only to vote out the parliamentary majority but also to initiate the recall of the *Saeima* through a referendum. Unfortunately, Latvia has a sad experience with referendums. The Constitution, adopted in 1922, has already imposed large quorums, but the law⁹ also provides for complex organizational procedures. It seems that the regulation in the law is designed to hinder, rather than promote, popular referendums.¹⁰ No referendum has taken place since the 2012 “language referendum”. The situation is being somewhat improved by the President Edgars Rinkēvičs, who has currently sent the *Saeima* a proposal for changes to the law that would strengthen the involvement of citizens with voting rights in deciding issues of importance to society and ensure greater state support in collecting signatures for voter legislative initiatives registered by the Central Election Commission. Such changes would make it easier to initiate referendums.¹¹

Therefore, the purpose of parliamentary inquiry is to investigate and collect all information related to alleged misconduct or negligence by public official or other person which can have impact on public interests.

2. The scope of parliamentary inquiry in *Satversme*

Article 26 of the *Satversme* provides – “the *Saeima* shall appoint parliamentary investigatory committees for specified matters if not less than one-third of its members request it”. This constitutional norm has to be changed since the adoption of *Satversme* in 1922.

There are various interpretations of the term “specified matters”. In Latvian legal doctrine, this concept is primarily associated with the oversight of the executive, the examination and analysis of the conduct of specific public institutions, or

⁸ Köhler, M. Umfang und Grenzen des parlamentarischen Untersuchungsrechts gegenüber Privaten im nichtöffentlichen Bereich [Scope and limits of the parliamentary right of investigation into private individuals in the non-public sector]. Berlin: Duncker und Humblot, 1995, p. 86.

⁹ Par tautas nobalsošanu, likumu ierosināšanu un Eiropas pilsoņu iniciatīvu [Law on National Referendums, Initiation of Laws and European Citizens' Initiative: Law of the Republic of Latvia] (20.04.1994). Available: <https://likumi.lv/ta/id/58065> [last viewed 07.04.2025].

¹⁰ Collection of research papers of the 79th International Scientific Conference of the University of Latvia. Riga: University of Latvia Press, 2021, pp. 411–419.

¹¹ Prezidents rosina būtiski samazināt 1. posmā nepieciešamo parakstu sliekšni referendumu ierosināšanai [President proposes to substantially lower the threshold for signatures for referendums in Stage 1]. Available: <https://www.lsm.lv/raksts/zinas/latvija/31.03.2025-prezidents-rosina-butiski-samazinat-1-posma-nepieciešamo-parakstu-slieksni-referendumu-ierosinasanai-precizets.a593593/> [last viewed 07.04.2025].

the discussion of other pressing public issues.¹² It should be noted that contemporary Latvian legal scholarship predominantly supports the view that the primary goal of parliamentary control is to ensure oversight of the executive.¹³ Accordingly, the objectives and justifications for establishing investigatory committees are generally linked to instances of misconduct or negligence within the executive branch.

A similar view was upheld during the interwar period. For instance, members of the II *Saeima* regarded the parliamentary investigatory committee as a tool of last resort used in cases where the executive was unable to address specific problems or when there was a potential risk of serious harm arising.¹⁴

Materials of Constitutional Assembly of the Republic of Latvia (*Satversmes sapulce*) indicates that Article 26 of the *Satversme* was inspired by Article 34 of the Weimar Constitution, where the first paragraph stated:

*The Reichstag shall have the right to, and upon the proposal of one-fifth of its members must, set up committees of investigation. These committees shall in public sitting inquire into such evidence as they or the petitioners consider necessary. The public may be excluded from sittings of a committee of investigation by a two-thirds majority vote. The rules of procedure shall regulate the business of the committee and determine the number of its members.*¹⁵

As can be deduced from Article 34 of the Weimar Constitution, the appointment of an investigative committee was not limited to specified matters or any particular purpose. German legal doctrine acknowledges that the authors of the Weimar Constitution in 1919 did not intentionally restrict the appointment of investigative committees. They assumed that members of the Reichstag would not initiate parliamentary inquiries to investigate issues that fell outside the parliament's competence.¹⁶

It should be noted that, according to legal scholars from the Weimar Republic period, the goal of an investigative committee was to collect necessary information regarding matters of public interest, which would be required for the adoption of another constitutional act by the parliament. This definition of the scope of parliamentary investigative committees aligns with the so-called Corollary theory, which has two interpretations: narrow and broad.¹⁷

The interpretation of the Corollary theory holds that a parliamentary investigatory committee may only be established when necessary for MPs to obtain information relevant to legislative or oversight decisions. This interpretation, prominent among German legal scholars and case law during the Weimar era, regarded such committees as auxiliary bodies supporting parliamentary decision-making.¹⁸ The broad interpretation of the Corollary theory does not limit the scope of parliamentary inquiry to the adoption of parliamentary acts. Instead, it limits the scope of the parliamentary investigative committee to the competences of parliament itself.¹⁹

¹² Balodis, R. (ed.). *Latvijas Republikas Satversmes komentāri. II nodaļa. Saeima*, p. 425.

¹³ *Balodis, R. (ed.). Parlamentārā izmeklēšana Latvijas Republikā. 1. Parlaments*, p. 59.

¹⁴ The minutes of IV session of II *Saeima* of the Republic of Latvia of 26 October 1926 (5th hearing).

¹⁵ The Constitution of the German Empire (11.08.1919), Art. 34. Available: https://germanhistorydocs.ghi-dc.org/pdf/eng/ghi_wr_weimarconstitution_eng.pdf [last viewed 07.04.2025].

¹⁶ *Köhler, M. Umfang und Grenzen des parlamentarischen Untersuchungsrechts*, p. 80.

¹⁷ *Ibid.*, pp. 76–77.

¹⁸ *Ibid.*, p. 142.

¹⁹ *Ibid.*, p. 77.

The roots of the limitations of parliamentary inquiry lie in the understanding of parliament's competences during the pre-war period. Parliament's competences were divided into primary and secondary competences, with primary competences being the adoption of parliamentary acts related to legislation and oversight over the government. Secondary functions, on the other hand, encompassed all other parliamentary endeavours that accompany and complement the primary functions of parliament. In other words, all parliamentary acts should be related to issuing legal documents in the legislative or oversight fields or at least be necessary for the preparation and adoption of the former.²⁰

German legal scholar and former justice of the German Federal Constitutional Court, Ernst-Wolfgang Böckenförde, criticized the narrow interpretation of the Corollary theory, arguing that it was outdated and more suited to the constitutional monarchy, where parliament was not seen as the representative institution of the sovereign but merely a public organ sharing authority with the monarch. Thus, parliament's competences were strictly limited by constitutional provisions, governments were not legally required to enjoy parliamentary confidence, and parliament had very limited political power. However, in a modern democratic parliamentary regime, such restrictions are not applicable. Parliament now serves as the representative institution of the sovereign will and participates in political leadership. Moreover, modern constitutionalism not only allows for the application of parliamentary political power but actively encourages it. Essentially, all constitutional provisions and unwritten prerogatives are interpreted and established by public organs that are closest to the sovereign – the People.²¹ Therefore, the validity of narrow interpretation of Corollary theory cannot be upheld due the transition from parliamentary monarchy to parliamentary democracy.

The broader interpretation of the Corollary theory, now widely accepted in German constitutional law, holds that the Bundestag's role extends beyond legislation and oversight to shaping the state's political agenda. As the only directly elected body, it must have access to information to address political and legal issues across all sectors.²² Some scholars go further, suggesting it covers all issues that can be debated in parliament, which is viewed as the "forum of the Nation".²³

By analogy, such argumentation can be applied to the *Saeima*, which is the sole public institution in Latvia directly legitimized by the sovereign. It should be noted that contemporary Latvian legal doctrine effectively applies the Corollary theory to define the scope of parliamentary inquiry, albeit without explicitly referencing it. For example, in commentaries on Article 26 of the *Satversme*, it is acknowledged that the tasks of the parliamentary investigative committee overlap with those of the *Saeima* – namely, protecting public interests, ensuring the rights of minorities, and shaping the national agenda in vital areas of state governance.²⁴

It is worth noticing that the aforementioned concepts align with the theory of essentiality. Accepted by the Constitutional Court of Latvia and in legal doctrine, the theory of essentiality holds that all significant decisions should be made by the legislature, as it is the only public authority within Latvia's public structure

²⁰ Böckenförde, E. *Parlamentarische Untersuchungsausschüsse und kommunale Selbstverwaltung* [Parliamentary committees of inquiry and local self-government]. *Archiv des öffentlichen Rechts*, Vol. 103, No. 1, 1978, p. 6.

²¹ *Ibid.*, pp. 7–8.

²² Köhler, M. *Umfang und Grenzen des parlamentarischen Untersuchungsrechts*, pp. 76–77.

²³ *Ibid.*, p. 78

²⁴ Balodis, R. (ed.). *Latvijas Republikas Satversmes komentāri. II nodaļa. Saeima*, p. 425.

that is directly democratically legitimized.²⁵ Accordingly, if the *Saeima*, or MPs for that matter, recognizes the necessity to address matters of public interest, access to information for resolving such matters falls within the scope of the theory of essentiality.

Article 26 of the *Satversme* does not impose any specific conditions on the *Saeima* for appointing a parliamentary investigatory committee, beyond the formal request for its appointment. As an informative tool of parliamentary control, it must be acknowledged that neither the *Satversme* nor any other legal provisions prohibit the initiation of a parliamentary inquiry regarding matters that fall outside the scope of legislative or oversight functions. Therefore, the “specified matters” in the light of Article 26 of the *Satversme* must be interpreted as all matters that the *Saeima* deems important enough to investigate. The limitations on subsequent activities within the context of a parliamentary inquiry are provided within the constitutional provisions of Latvia.

3. The boundaries of the parliamentary inquiry in contemporary Latvian constitutionalism

As stated earlier, the goals and tasks of the parliamentary investigatory committees of the *Saeima* are aligned with the status functions of the *Saeima*. Accepting this interpretation of Article 26 of the *Satversme* consequently raises the question of where the scope of parliamentary inquiry ends.

3.1. The general review of boundaries of parliamentary inquiry

The functions of the *Saeima*, as well as its boundaries, can be defined through the application of the previously mentioned theory of essentiality, which asserts that all significant decisions must be made exclusively by the legislature. However, it would not be correct to state that only significant matters fall within the competence of the parliament. Certainly, the *Saeima* is required to address a wide range of issues in its day-to-day work, varying in significance. Nevertheless, the theory of essentiality helps connect the competences of the parliament with the matters MPs are authorized to address. This theory prohibits delegating to the executive or other public institutions and officials matters that must be decided by the parliament. In this context, it is reasonable to conclude that, conversely, if a question falls within the exclusive competence of another public institution, the parliament cannot, *prima facie*, conduct an inquiry in that respective field.

However, it must be emphasized that the *Saeima* is a political institution that primarily exercises political authority. For example, if MPs have concerns about the legality of operations in the financial sector that led to violations of international and national sanctions, it is reasonable to allow MPs to initiate a parliamentary inquiry to investigate the matter. In doing so, MPs can gather information to assess the effectiveness of national regulations, the actions of law enforcement, the conduct of private individuals, and any necessary changes in the political agenda to protect Latvia’s reputation in the international community. Therefore, the theory of essentiality does not negate the political nature of the parliament, but rather complements it, thereby broadening the scope of the parliamentary inquiry.

²⁵ The Judgment of the Constitutional Court of the Republic of Latvia from 21 December 2009 in case No. 2009-43-01, para. 30.1. Available: https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2016/02/2009-43-01_Spriedums.pdf#search=2009-43-01 [last viewed 07.04.2025].

The answer to the question of the boundaries of parliamentary inquiry lies within the principle of the separation of powers. The *omnipotence* of the *Saeima* is a fundamental element of Latvian constitutionalism. Therefore, in order to determine the boundaries of parliamentary inquiry, we must analyse what the *Saeima* cannot do. For example, the *Saeima* can conduct a parliamentary inquiry not only to improve existing regulations but also to identify grey areas in the law that need to be addressed with specific legal norms to protect constitutional values, human rights, the commercial sector, customer protection, etc. However, it cannot extend to areas beyond parliamentary competence, such as altering the core of the *Satversme* or deciding on EU membership, which are reserved for national referenda.

If the matter in question can be regulated by a legislative act or any other parliamentary decision, then it becomes an appropriate subject for parliamentary inquiry. The parliament can carry out its functions only if it has access to all the necessary information. Given that the parliament can influence not only the executive but also the judiciary and private individuals through its laws, we must conclude that parliamentary inquiry can address issues related not only to the executive but also to the judiciary and the private sector.²⁶

3.2. Parliamentary inquiry over the judiciary and in private sector

In the case of a parliamentary inquiry targeting the executive, the model of separation of powers established in the *Satversme* is not violated, as the Cabinet of Ministers depends on the confidence of the *Saeima*. However, when a parliamentary inquiry addresses issues within the judiciary, the scope of the inquiry should be related to the *Saeima's* competencies in relation to the judiciary.

According to Article 84 of the *Satversme*, judicial appointments as well as removal of judges from the office performed by the *Saeima*. The parliamentary decision on the appointment of a judge is political,²⁷ and there was a precedent in which MPs rejected a candidate for the Supreme Court on political grounds, rather than legal ones.²⁸ Accordingly, a parliamentary inquiry can be conducted in matters related to the judiciary, as it can not only collect information to be used in discussions on future judicial appointments but also influence the cooperation between the *Saeima* and the judiciary.

It is crucial to note that judicial independence is one of the cornerstones of the rule of law. The excessive use of parliamentary inquiries targeting the judiciary can undoubtedly endanger judicial independence and, as a result, violate not only the *Saeima's* competences but also the separation of powers guaranteed by the *Satversme*.

The parliamentary inquiry in the private sector is rather complicated. On one hand, matters that arise in the private sector can undoubtedly be the subject of a parliamentary inquiry, aimed at drafting new regulations or modifying existing ones to fulfil the *Saeima's* competences. On the other hand, such an inquiry can jeopardize the privacy and autonomy of individuals who may be subjected to investigation by

²⁶ Linck, J. Untersuchungsausschüsse und Privatsphäre [Inquiry Committees and Privacy]. Zeitschrift für Rechtspolitik, 20(1), 1987, p. 14.

²⁷ Judgment of the Supreme Court (Senate) of the Republic of Latvia from 10 October 2010 in case No. SKA-589/2010, para. 11. Available: <https://at.gov.lv/downloadlawfile/4712> [last viewed 07.04.2025].

²⁸ Decision of Plenum of the Supreme Court (Senate) of the Republic of Latvia No. 2 of 18 October 2022 Available: https://at.gov.lv/files/uploads/files/2_Par_Augstako_tiesu/Plenums/plenuma%20lemums%2018022022.docx [last viewed 07.04.2025].

the *Saeima*. The situation becomes even more complicated because the appointment of a parliamentary investigative committee is a political act, and consequently, defining the scope of the investigation is also a political decision. This political act cannot be reviewed by the judiciary, which means that private individuals cannot challenge the legality of the committee's appointment in court. This raises potential concerns regarding the legality of parliamentary inquiries in the private sector.

In this context, it must be emphasized that a parliamentary inquiry is an informative tool of parliamentary control. By itself, it cannot constitute legal consequences for individuals. The information collected by MPs during the parliamentary inquiry can be used in drafting legislative acts or, if permitted by the relevant regulation, individual acts that may impact specific individuals. Therefore, even if the "results" of the parliamentary inquiry eventually affect private individuals, they still have access to legal remedies in case of illegality.

It might, however, potentially still be question on legality of subjecting private individuals to parliamentary inquiry. Article 7(1) of the Law on Parliamentary Investigatory Committees²⁹ provides that "a parliamentary investigatory committee has the right to invite any person to its meetings and to hear out the explanations thereof". Hence, "any person" can also refer to an individual who is not a holder of a public office but a private individual who possesses information vital to the parliamentary inquiry. Parliamentary inquiries resemble criminal proceedings in certain aspects. Under Article 7(2) of the Law on Parliamentary Investigatory Committees, a person may be brought by force upon a court's decision. Articles 7(3) and 7(4) grant the right to remain silent on self-incriminating matters and impose confidentiality obligations. Moreover, providing false information, refusing to cooperate, or attempting to influence testimony constitutes a criminal offence under Articles 272 and 272¹ of the Criminal Law.³⁰

The aforementioned indicates that the legislator has already decided on the legality of the participation of private individuals, along with the criminal procedural guarantees within the parliamentary inquiry. It also must be mentioned that Article 12(1) of the Law on Parliamentary Investigatory Committees provides that "members of a parliamentary investigatory committee and the staff thereof shall be held criminally liable in accordance with the procedures laid down in law for unauthorised disclosure of the official secret and a private commercial secret, and also offensive personal information of private individuals." Thus, private individuals have legitimate expectations that all private information which is collected by the parliamentary investigatory committee will be protected according to the law.

In conclusion to this subparagraph, it must be emphasized that parliamentary inquiry into the judiciary or the private sector is permissible, however, it is an exception. The judiciary cannot be excluded from the checks and balances system and, therefore, cannot evade parliamentary control. However, due to the political nature of parliamentary inquiries, there is a risk that judicial independence could be compromised. Consequently, *Saeima* should initiate such investigations only as a last resort when addressing matters of significant public interest.

²⁹ Parlamentārās izmeklēšanas komisiju likums [Law on Parliamentary Investigatory Committees] (08.05.2003). Available: <https://likumi.lv/ta/id/75140-parlamentaras-izmeklesanas-komisiju-likums> [last viewed 07.04.2025].

³⁰ Krimināllikums [Criminal Law] (17.06.1998). Available: <https://likumi.lv/ta/id/88966-kriminallikums> [last viewed 07.04.2025].

Similarly, if a parliamentary inquiry is to be conducted in the private sector, MPs should carefully consider all other alternative options for collecting the necessary information. Even though it is not a legislative act or any other type of legal act, the principle of proportionality still provides guidelines that must be respected whenever human rights are restricted. Therefore, a parliamentary inquiry in the private sector should only take place if there is no other alternative that guarantees similar efficiency in collecting information necessary for performing *Saeima's* competences.

3.3. "Public interests" clause as a precognition for parliamentary inquiry

As established in this paper, a parliamentary inquiry can take place if the goal of the investigation relates to the competences of the *Saeima*. As noted earlier, the ultimate tasks of the *Saeima* are the protection of public interests, the guarantee of the rights of minorities, and the definition of the national agenda in vital fields of the state. This list is not exhaustive but provides a general overview of the ultimate goal of all parliamentary endeavours, which is the protection of public interests.

In the interwar period, Professor Kārlis Dišlers stated that every state function is subordinated to serving the public interests and the needs of the people.³¹ The *Saeima*, as one of the constitutional organs of the Republic of Latvia, performs its tasks to protect and preserve the public interests of the People of Latvia and its State. Similarly, in modern Latvian legal doctrine, public interests are considered the main tasks of the *Saeima*,³² from which other competences can be derived.

This argument leads to the conclusion that, since the scope of parliamentary inquiry is limited to the competence of the *Saeima*, the protection of public interests is the fundamental concept that limits parliamentary inquiry. In this context, every parliamentary inquiry, regardless of its agenda, must be conducted only if it serves the public interest. The limitation of parliamentary inquiry by the protection of public interests not only ensures that the *Saeima* remains in check while conducting investigations under Article 26 of the *Satversme* but also serves as a safeguard for private individuals who might be involved in the parliamentary inquiry.

In this context, Böckenförde argues that, while the protection of public interests may justify a parliamentary inquiry, there are subjective interests that should not be the subject of such investigation. Therefore, the parliament must refrain from investigating issues that do not fall within the realm of public interest. However, defining "public interest" is challenging, given that the parliament operates as a political authority. Consequently, limiting the concept of public interest through legal norms could substantially hinder MPs' ability to conduct parliamentary inquiries. Public interest should be recognized only when a matter concerns the public as a whole or a significant segment of it. As the representative institution of the people, the parliament has the authority to designate certain interests as public.³³

While the concept of public interest may appear overly broad, it cannot be fully captured by legal norms. Parliamentary inquiries often aim to address political issues and thus depend on the initiating party's interpretation of the matter. Article 26 of the *Satversme* allows one third of the *Saeima* – typically the opposition – to initiate inquiries, placing the burden on them to define the public interest at stake. Imposing

³¹ Dišlers, K. Ievads Latvijas valststiesību zinātnē. Ar zinātnisko redaktoru piezīmēm [Introduction to the science of Latvian constitutional law. With notes by scientific editors]. Rīga: Tiesu namu aģentūra, 2017, p. 36.

³² Latvijas Republikas Satversmes komentāri. II nodaļa. Saeima [Commentary to the Constitution of the Republic of Latvia. Chapter II. *Saeima*], Balodis, R. (ed.). Rīga: Latvijas Vēstnesis, 2020, p. 425.

³³ Böckenförde, E. Parlamentarische Untersuchungsausschüsse, p. 15.

an additional validation of this definition could hinder the effectiveness of inquiries and weaken the opposition's ability to hold power to account.

It is also true that if the decision-making process regarding the appointment of a parliamentary investigatory committee would be subjected to the judiciary, it would lead to complications. While the court can evaluate whether the actions of public officials comply with legal norms, it cannot assess the political grounds or reasoning behind those actions. Allowing the judiciary to intervene in this process would mean hijacking of the exclusive competences of the parliament, effectively usurping the decision-making authority that the *Satversme* has entrusted to MPs.

In conclusion, it must be acknowledged that the responsibility for determining the presence of public interest in the context of a parliamentary inquiry rests solely with the MPs who request the appointment of a parliamentary investigatory committee. While this may be problematic due to the seemingly unchallenged and broad discretion, it is a constitutional solution that balances the interests of the parliamentary majority and the opposition. The opposition, while lacking all the necessary tools to gather information for fulfilling its tasks, whether legal or political, is still able to initiate the inquiry. It should be noted here that the conclusions of parliamentary committees are not binding on either the parliament or the government, and are "taken for information only". This is the real reason why the elite and the media often pretend not to hear the conclusions of parliamentary investigations or try to ridicule the process, trying to portray it as a "parliamentary circus". At the same time, the important conclusions of the parliamentary investigation are still being listened to, and some changes are still taking place.

Summary

Parliamentary control is a cornerstone of modern constitutionalism, ensuring checks and balances and enabling both the majority and opposition to oversee public institutions. Among the tools of parliamentary control, informative mechanisms – particularly parliamentary inquiries – play a crucial role by granting MPs access to essential information.

Unlike questions or interpellations, parliamentary inquiries are public and potentially impactful, reinforcing democratic accountability. According to the *Satversme*, an investigatory committee may be established for "specified matters", a concept traditionally tied to executive oversight. However, modern Latvian constitutional theory supports a broader interpretation, aligning the scope of inquiry with the full range of parliamentary competences.

Given the central constitutional role of the *Saeima*, the inquiry's scope may extend to the judiciary or private sector, provided it serves a legitimate public interest and respects the principle of proportionality. While the inquiry itself carries no direct legal consequences, its findings may inform legislative or political action. The concept of "public interest" is thus central, yet inherently political, making judicial review of such inquiries problematic and potentially harmful to parliamentary autonomy and opposition rights.

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<https://doi.org/10.22364/jull.19.09>

Mediation in Lithuanian Criminal Justice

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The article offers analysis of the Lithuanian model of mediation in criminal justice, the aspects of its development and implementation. Additionally, the authors consider the place of mediation within criminal justice in the general institutional framework of mediation. The model of mediation in probation services is further revealed, its practice and perspectives are discussed, analysing the advanced practice of European countries in the application of mediation in criminal justice. The authors also assess the existing legal framework in Lithuania and the need to change the current regulatory framework for the implementation of mediation in criminal justice in the legal system.

Keywords: mediation, mediation in the probation system, mediation in criminal justice, probation.

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Introduction

The Lithuanian practice of mediation in criminal justice is unique in the context of other EU countries, as mediation practice in Lithuania has been introduced and

developed in civil and later administrative justice. Only later did separate mediation practices emerge in criminal justice. Although mediation doctrine shows that it was mediation in criminal justice, especially for juvenile offenders, that was the starting point for the introduction and development of a general mediation system.

Thus, mediation in criminal justice in Lithuania has taken different forms, with attempts being made to apply mediation in the cases of juvenile offenders in police institutions,¹ episodic mediation in the application of the provisions of the Law on the Minimum and average supervision of the child, and in the activities of the probation service.²

However, it has to be admitted that mediation in criminal justice is fragmented, and present only in a narrow range of applications, and the main reasons for this are insufficient legal regulation and the absence of a unified policy on the issue.

The article presents the practice of applying mediation in the probation service, which is unique and innovative, as it is the first model of applying mediation in criminal justice in Lithuania, where a system of mediation services at the level of the institution has been developed and implemented. Mediation in the probation service is defined as an effective way to resolve conflicts arising from offences, allowing for conflict solutions that meet the needs of both parties (the victim and the offender), as well as enabling the reduction of over-involvement of persons in formal criminal justice procedures and acting as a preventive measure to reduce the risk of recidivism.

The object of the study – the implementation of a mediation service model in criminal justice.

The aim – to present proposals for the maintenance and development of mediation in the probation system in criminal justice.

The objectives:

- to provide an overview of the possibilities of applying mediation in criminal justice;
- to analyse and present a model of mediation in the probation system;
- to identify the factors for the development of mediation, the legal basis for its application and its sufficiency;
- to present the practice of mediation in criminal justice in foreign countries.

1. Possibilities of applying mediation in criminal justice

The introduction of mediation into the probation system was not accidental. The decision was based on the advanced practice of European countries (e.g., the Czech Republic,³ Latvia⁴), where mediation has been used in probation services for more

¹ Note: The progressive project “Strengthening the capacity of police officers to ensure an effective impact on juvenile delinquent behaviour through the implementation of restorative justice models”, implemented by the Police Department under the Ministry of the Interior and the Crime Prevention Centre in Lithuania, is part of the European Union’s Special Programme “Prevention of and Fight against Crime” 2007–2013.

² According to data provided by the National Education Agency’s Education management information system. Available: <https://www.svis.smm.lt/> [last viewed 19.07.2025].

³ The probation and mediation service began operating in 2001. See, for example, *Matoušková, A.* Supporting victims of crime and offenders through probation and mediation. *Justice Trends*, 2022. Available: <https://justice-trends.press/supporting-victims-of-crime-and-offenders-through-probation-and-mediation> [last viewed 19.07.2025].

⁴ Mediation in criminal justice has been used in Latvia since 2004 and served as a basis for the subsequent implementation of mediation in other sectors. See, for example, *Tvaronavičienė, A., Kaminskienė, N., Rone, D. and Uudeküll, R.* Mediation in the Baltic States: Developments and Challenges

Table 1. Use of mediation in the Lithuanian Probation Service in 2019–2023

No.	Year	Number of mediations
1.	2019 m.	719
2.	2020 m.	626
3.	2021 m.	516
4.	2022 m.	415
5.	2023 m.	484

An analysis of the statistics on mediation in the Probation Service shows that there has been a decrease in the number of mediation cases since 2019. The decrease in the number of mediations is due both to the limitations on the use of direct mediation during the COVID pandemic and to changes in the Probation service. It should be mentioned that in 2016, after the introduction of mediation in the probation system, 12 mediators were recruited, later the number of mediators was reduced to 10, but the higher number of mediators has led to an increase in the volume of mediation services, especially the part of the mediations that were “externally” mediated, that is, mediation initiated by the courts, the police, the prosecutor’s office and other social partners. This practice is no longer applied today, and more emphasis is placed on mediation cases involving prisoners under the supervision of the Lithuanian Prison Service.

The analysis of mediation cases in the Probation Service in 2023–2024 showed that 78% of mediation cases dealt with restitution, i.e., compensation for damages, 17% with violence between the convicted person and the victim, and 5% with other issues, which mostly ended with the convicted person’s admission of guilt and a sincere apology.

Thus, mediation practice has shown that in 17% of cases, mediation is implemented in conflicts arising from domestic violence. There is no unanimous opinion on this issue, as the use of mediation carries an increased risk of secondary or even repeat victimization. However, without denying the potential risks for the victim, it should be stressed that in the cases mentioned above, a specific form of mediation and tactics are used. Mediators use the possibilities of distance mediation, as well as a whole range of safety measures aimed at protecting the victim (e.g., calling the parties to the mediation at different times, while avoiding pre-mediation conflicts; comediation; organization of individual caucus meetings, etc.).

In addition, specific guidelines have been drawn up on the subject, which stress that mediation in cases of violent crime is possible with emphasis on the specific training and specialization of the mediator(s), the pre-mediation analysis of the situation and possible risks, the use of specific interviews, the gathering of prior information, and the victim’s informed consent to participate in the mediation, including the right to withdraw from the process. It is also stressed that mediation in cases of domestic violence is (mostly) used and produces positive results when the violence is of a psychological and economic nature and when the victim does not suffer serious health problems. The model of mediation (in cases of domestic violence) does not focus on reconciliation of the parties, but rather on an adequate, rational solution to the conflict between the parties.

Another important aspect of the model is that mediation in cases of violent crime is combined with specific approved motivational (e.g., EPP – Behaviour-Change-Transformation) and behaviour change programs (e.g., Domestic Violence

Intervention Program) for convicted prisoners, which create a favourable environment for the implementation of mediation.

Thus, one of the most important aspects of the mediation doctrine is the effectiveness of mediation in terms of timely intervention, de-escalation of the conflict between the parties and its impact on both parties: For the victim, by ensuring restitution, removing the factors that contribute to feelings of insecurity, and avoiding secondary or repeated victimization, whereas for the perpetrator, avoiding stigmatization and criminal records, while at the same time creating conditions for reparation.

As mentioned above, mediation in Lithuanian criminal justice is applied narrowly and in the context of court-imposed sentences. It should be noted that the current legal framework is not adequate to ensure the smooth application of mediation throughout the criminal prosecution process. The transfer of mediation cases to the probation service is exclusively based on cooperation between law enforcement authorities, on service assistance and on an understanding of appropriate trust and confidentiality of information.

A further analysis of the fragmented practice of mediation reveals some cases where mediation can be applied prior to the pre-trial investigation (the “front door” model). Following is not a description of the basis for the use of mediation as such, but characterisation of the possibilities to use mediation as a tool for resolving a conflict or dispute. Thus, the circumstances which make criminal proceedings impossible are Article 3(1)(3) of the Code of Criminal Procedure if the person who committed the offence was under the age of criminal responsibility at the time of the commission of the offence, Article 38(1)(3) if the person has reconciled with the victim, Article 3(1)(4) in the absence of a complaint by the victim, where proceedings can only be initiated on the basis of a complaint by the victim.

The “Grounds for imposing measures of minimum and medium supervision of the child” are also highlighted, where the mandatory application of mediation is possible for a minor who has committed an act that has the characteristics of a criminal offence or a criminal misdemeanour, but who has not yet attained the age of criminal responsibility under the criminal laws (Article 8(1)(1) of the Law on the Minimum and Average Care of a Child).⁸

Mediation practice has shown that mediation can also be used during pre-trial investigations or trials. There are the following distinct legal grounds for this:

1. Exoneration from criminal liability where the perpetrator and the victim reconcile. Article 212(1)(5) of the Code of Criminal Procedure applies when the suspect and the victim reconcile in cases provided for in Article 38 of the Criminal Code;
2. Exemption from criminal liability of a minor, where a minor who has for the first time committed a reckless crime or a minor or a light crime or a trivial intentional crime may be released from criminal liability by the court if he has apologized to the victim and has compensated or repaired, in whole or in part, the property damage caused by his work or by means of money (Art. 93 of the Criminal Code).

⁸ Law of the Republic of Lithuania on Minimum and Average Care of a Child. Valstybės žinios, No. 80-3214, 2007.

3. Mediation in the Lithuanian Prison Service

The systematic use of mediation in Lithuanian prisons started in 2018 with the adoption of a special procedure on the use of mediation in prisons⁹, although the practice itself was not extensive, with up to 20 mediation cases per year. It should be mentioned that in 2023–2024, the use of mediation in Lithuanian prisons was expanded, as the Lithuanian Prison Service and the Probation Service signed a cooperation agreement,¹⁰ in which one of the points is the use of mediation in prisons. It is also worth to note para. 19.1.4 of the Lithuanian Probation Service's Strategic Guidelines for 2024–2030,¹¹ where the development of mediation services is indicated, with particular emphasis on social partnership.

Current practice shows that there are around 30 mediations a year in Lithuanian prisons. In addition, among the mediators working in the probation service, there are mediators who specialize in working in prisons, as this is related to the specifics of the application of mediation, its objectives and the outcome, which are important:

- The convicted person demonstrates by real actions, concrete decisions that his attitude and behaviour are changing, which is crucial for the assessment of his risk of re-offending, e.g., when convicted persons start to compensate for the damages awarded to the victims, answer questions, show that they take responsibility, do not deny their guilt, then there is a basis for the assessors of the resocialization process to revise the level of risk;
- The principle of progressivity of the sentenced person's sentence is realized when he demonstrate a change in his behaviour and, at the same time, a change in the conditions of serving the sentence, and may be transferred to a semi-open or open place of detention;
- The issues at stake are family matters, the convicted person's immediate environment, i.e., marriage, child support and property obligations;
- It has a positive impact on the resocialization process, as mediation creates a space to meet directly and resolve persistent conflicts and misunderstandings in the immediate environment, and has a preventive effect.

In summary, the place of mediation in the penal enforcement system is defined both in the Penal Enforcement Code and in the Probation Act, and its scope is dictated by the realization of the principle of restorative justice, i.e., by compensating the victim for the damage, by re-establishing a constructive and cooperative relationship between the parties to the conflict, and by giving the convicted person an opportunity to demonstrate positive change and to have it evaluated in terms of his resocialization.

It is important to underline that even if a unified institutional framework for mediation is created, which will include mediation in criminal justice to its full

⁹ Order of the Director of the Prison Department under the Ministry of Justice of the Republic of Lithuania of 19 October 2018 "On the Approval of the Description of the Procedure for the Organisation and Conduct of Conciliatory Mediation in the Institutions of Deprivation of Liberty Places". Document No. V459, TAR, 19-10-2018, No. 16397. Available: <https://eseimas.lrs.lt/portal/legalAct/lt/TAD/41905440d3d611e8a3fadd00a256c61a?positionInSearchResults=11&searchModelUUID=d87d1f9f-ace1-43f1-ac76-8add998f7fe1> [last viewed 08.02.2025].

¹⁰ Cooperation between Lithuanian prisons and probation services is being strengthened. Available: https://kalejimai.lrv.lt/lt/naujienos/stiprinamas-lietuvos-kalejimu-ir-probacijos-tarnybu-bendradarbiavimas/?utm_source=chatgpt.com [last viewed 18.07.2025].

¹¹ Order of the Director of the Lithuanian Probation Service No. V-29 of 19 January 2024. On the approval of the Strategic Guidelines for the Lithuanian Probation Service 2024–2030. Available: <https://probacija.lrv.lt/media/viesa/saugykla/2024/2/5tkM6-jwtNQ.pdf> [last viewed 08.02.2025].

extent, it will not eliminate the need for mediation and other restorative justice models in the penal system. Restorative justice is the fundamental principle on which the modern Lithuanian penal enforcement system must be based, focusing on changes in the behaviour of the convicted person and the satisfaction of the victim's needs and interests.

4. Analysis of foreign practices of mediation in criminal justice

This part of the article offers the analysis of mediation in criminal justice in foreign countries, which shows that the models used by countries can be divided into two main groups: (i) those that apply a partial model of mediation in criminal justice, and (ii) those that apply a full model of mediation in criminal justice.

The difference between mediation models is mainly related to the stage of the process at which the parties can initiate mediation. In a partial mediation model, the parties are restricted as to the point at which mediation is initiated, whereas in a full model the parties are free to initiate mediation at any stage of the process.

As examples of the full model, the authors of article will use the examples of Belgium, the Czech Republic, Germany (partially), Spain, Croatia, Cyprus, Poland, Sweden and Finland, as these countries apply the latter model in their criminal proceedings.

The Ireland, Denmark and Hungary will be used as examples of the partial model.

In all full-model countries, mediation can be introduced at any stage in criminal proceedings. That is, both before, during and after the trial. The consent of the members of the process, especially the victim, is an important criterion. In some countries applying the full model, e.g., Belgium,¹² Czech Republic,¹³ Germany,¹⁴ Cyprus,¹⁵ the process is not possible due to the role/power differential, which means a potentially unequal position of the parties in the process, which may affect both the process and the outcome.

In Belgium, the Czech Republic, Germany, Croatia,¹⁶ Cyprus,¹⁷ and Sweden,¹⁸ mediation cannot be used for serious and violent crimes. In Belgium, the list is extended to include crimes that threaten the state, and in Spain¹⁹ and Croatia for crimes of public interest. In the case of Germany,²⁰ it is further elaborated by stating that mediation is not available for public law disputes in which one of the parties

¹² Mediation in EU countries. Available: https://e-justice.europa.eu/topics/taking-legal-action/mediation/mediation-eu-countries/be_en?BELGIUM=&member=1 [last viewed 08.02.2025].

¹³ Ibid.

¹⁴ Ibid.

¹⁵ Ibid.

¹⁶ Mediation in EU countries. Available: https://e-justice.europa.eu/topics/taking-legal-action/mediation/mediation-eu-countries/be_en?BELGIUM=&member=1 [last viewed 08.02.2025].

¹⁷ Plevri, A. Mediation in Cyprus: theory without practice. *The Cyprus Review*, 30(1), 2018, pp. 127–148.

¹⁸ Mediation in EU countries. Available: https://e-justice.europa.eu/topics/taking-legal-action/mediation/mediation-eu-countries/be_en?BELGIUM=&member=1 [last viewed 08.02.2025].

Jacobsson, M., Wahlin, L., Fromholz, E. Victim offender mediation in Sweden: an activity falling apart? *Nordic Mediation Research*, 2018, pp. 67–79;

Jacobsson, M., Wahlin, L., Andersson, T. Victim – offender mediation in Sweden, Is the victim better off? *International Review of Victimology*, 18, 2018, pp. 229–250.

¹⁹ Martell, R. P., Vilalta, A. E. Overview of the new normative on mediation in Spain. Available: https://www.ama.asn.au/Overview_of_the_new_regulation_in_Spain_UK_02062012.pdf [last viewed 08.02.2025].

²⁰ Dendorfer-Ditges, R. Mediation in Germany: 2019. Available: <https://www.lexology.com/library/detail.aspx?g=cce08f79-a8c8-43a3-9da0-f0dc861fc2bb> [last viewed 08.02.2025].

is the State (one of the institutions). In Poland,²¹ there is no statutory limitation on the cases in which mediation in criminal proceedings would not be possible, so in theory mediation can be requested in any case and regardless of the nature or gravity of the case. However, in Poland, the final decision to refer a case to mediation is taken by the court or the prosecutor, regardless of the will of the parties, and the only limitation is the duration – mediation cannot last more than one month. In contrast, the Finnish model²² does not contain a strict and mandatory prohibition of mediation in certain crimes, but rather requires mediation to be used more cautiously in some cases, and does not recommend mediation at all in sexual offences or crimes against children. The identification in the legislation of crimes for which mediation is not possible can be regarded as reasonable, particularly in view of the type of crime and the protected values that have been attacked. However, the practice in Poland of leaving the right to decide whether mediation is possible to the judge or the prosecutor, rather than to the parties themselves, is to be criticised as potentially having negative consequences in terms of discrimination or corruption.

Mediation is not allowed in Spain, Croatia and Cyprus for criminal cases of domestic violence, and in Spain for non-transferable rights (e.g., transfer of custody). Thus, cases involving family law relations in the context of criminal law relations limit the possibility of a mediation process.

Another crucial condition for the mediation process is the existence of legal capacity. If a person is incapacitated due to illness, age or other conditions, mediation is not possible in criminal proceedings. This condition applies in the Czech Republic, Germany and Finland. Capacity to act is seen as a crucial element, as only a person with capacity can take decisions with an understanding of their content, consequences and impact on the person's legal position.

In Belgium and the Czech Republic, mediation in criminal proceedings is also not available in cases where the trial needs to take place as soon as possible, and in Croatia in cases where the mediators are not qualified in the relevant disputes or where the subject matter of the dispute is unclear.

As mentioned above, unlike the full model, the partial model does not allow mediation to be initiated at any stage of the criminal proceedings, i.e., there are clear criteria for which stages are allowed and which are not. However, as in the full model, in the partial model, even if the criterion on the stage at which the parties may request the initiation of mediation is met, there are some offences for which mediation is not allowed.

In Ireland²³ mediation cannot be used when a trial is underway and a final judgment is imminent. However, it is up to the parties involved to decide whether they wish to use mediation and, most importantly, at what point in time, within the limits of the legal framework, in accordance with the Mediation Act 2017.²⁴ In Ireland, mediation cannot be used for serious and anti-state offences, as well as for

²¹ Mediation in criminal cases. Available: [Mediation in criminal cases \(karne.pl\)](#) [last viewed 08.02.2025]; *Silecka-Marek, E.* The institution of mediation in Polish criminal law. *Resocjalizacja Polska*, 19(1), 2020, pp. 123–140;

Bronski, W., Bara, D., Dqbrowski, M., Sławicki, P. Mediation in Penal Enforcement Proceedings *de lege lata*. *Studia Iuridica Lublinensia*, 32(2), 2023, pp. 57–72.

²² *Paasonen, J.* Mediation in criminal cases in Finland. 2023. Available: https://osuva.uwasa.fi/bitstream/handle/10024/16640/Osuva_Paasonen_2023.pdf?sequence=2 [last viewed 18.07.2025].

²³ Mediation in EU countries. Available: https://e-justice.europa.eu/topics/taking-legal-action/mediation/mediation-eu-countries/be_en?BELGIUM=&member=1 [last viewed 08.02.2025].

²⁴ Mediation Act 2017. Available: [Mediation Act 2017 \(irishstatutebook.ie\)](#) [last viewed 08.02.2025].

disputes relating to public regulation. Mediation may not always be used in domestic violence disputes, nor in child custody disputes, particularly where there is a question of whether such a solution would be best for the child. In such cases, the courts often step in and decide what is potentially the best solution for the child, i.e. to initiate a mediation process or to stay in the court phase of the dispute. Furthermore, mediation in Ireland is not possible due to (i) imbalance of power; (ii) lack of capacity; (iii) lack of consent of either party. Although an agreement reached in mediation may become legally enforceable, if one party does not comply with the agreement or tries to avoid it, the mediation becomes ineffective. Thus, once the mediation process has been completed and a settlement has been reached, it is not invariably a 100% resolution, as one of the parties may decide not to comply with it.

In Denmark,²⁵ which also has a partial model, mediation is in no way a substitute for judicial proceedings and can only be used after the latter have been concluded. If the parties decide to initiate the mediation process before the start of the trial and the mediation is successful for the parties, it is the judge who decides, the start of the trial, how the mediation will affect the court proceedings. In Denmark, as in Ireland, mediation is only possible if both parties agree to it.

There are also restrictions on the participation of minors, requiring the consent of their representatives (limitation of legal capacity). In the Danish case, mediation is only practicable on the condition that the perpetrator admits having committed the offence. Furthermore, there are no clear guidelines or clear exceptions as to which offences can be subject to mediation and which cannot. As in Finland, in Denmark mediation can only be used in domestic violence cases when such cases are referred by a police officer or a public prosecutor, and provided that the mediation is used for the first time, i.e., it has not been unsuccessful in the past, and the violence is not of a repetitive nature.²⁶

The partial model is also applied in Hungary.²⁷ As in Denmark, in Hungary the defendant must have admitted the offence in order to participate in mediation. In terms of timing, mediation is only available at the pre-trial stage and before the formal charge, but if there are reasons (which are not specified) why it would be appropriate to use mediation after the start of the trial, this option is left open to the parties. In Hungary, mediation is not possible if the accused does not show active repentance, which is the basis for the use of mediation. Unlike other countries, Hungary has not only established cases where mediation is not possible, e.g., if the defendant is a recidivist, if the crime was committed while a member of a criminal organisation, but also cases where mediation can be used, e.g., in cases of offences against life, physical integrity, health, personal liberty, dignity and certain fundamental rights, as well as in cases of traffic offences, offences against property or intellectual property and/or criminal offences punishable by up to three years' imprisonment.

²⁵ Mediation in EU countries. Available: https://e-justice.europa.eu/topics/taking-legal-action/mediation/mediation-eu-countries/be_en?BELGIUM=&member=1 [last viewed 08.02.2025]; Law on the resolution of conflicts related to criminal offences. LAW No. 467 of 12 June 2009. Available: <https://www.retsinformation.dk/eli/lta/2009/467> [last viewed 08.02.2025].

²⁶ Lappi-Seppälä, T., & Storgaard, A. Nordic Mediation – Comparing Denmark and Finland. *Neue Kriminalpolitik*, 27(2), 2015, pp. 136–147. Available: <http://www.jstor.org/stable/26315681> [last viewed 08.02.2025].

²⁷ Barabás, T. A. Restorative justice in Hungary: a rapidly growing field of practice. *Restorative Justice*, 3(3), 2015, pp. 387–395. <https://doi.org/10.1080/20504721.2015.1109348>; Mediation in Court Proceedings. 2024. Available: https://wydawnictwo.iws.gov.pl/wp-content/uploads/2024/06/MediationCourt_06__18-03-2024_DRUK.pdf [last viewed 08.02.2025].

An analysis of the use of mediation in criminal justice in different countries has shown that, regardless of the model used by a given country, there are fundamental grounds for not proceeding. These include:

- reluctance of the parties to participate in mediation;
- power difference;
- cases of serious, violent crime;
- cases of domestic violence.

Acts that either make the process impossible or single out as requiring special attention include, in the practice of the countries, those involving minors. An analysis of the practice in the various countries shows that the parties do not necessarily prohibit mediation in cases involving minors, but that, even if they do, there remains a duty to assess very carefully the need for and the possibility of such mediation in the light of the specific situation of the minor, the objectives pursued by the mediation, and the possibility of achieving those objectives without causing additional harm to the minor.

When assessing the practice in the countries regarding the offences which do not allow the initiation of mediation, there is a tendency for such offences to be related to particularly sensitive cases, which involve attacks on the most protected values (life, health), or which are special because of the nature of the case and the parties involved in the case, e.g., family members, cases of domestic violence, sexual offences. This type of crime is distinguished by the fact that it is extremely sensitive (psychologically, emotionally). These crimes have a direct relationship with the victim, are committed in the victim's immediate environment (in cases of domestic violence), or have complex psychological consequences. Such reasons are likely to determine the practice of the parties not to apply mediation in this type of criminal case.

One of the most important criteria, which is common to almost all parties, is that the parties to the mediation must be voluntary, as the basis for the mediation process. The mediation process shall not be initiated and shall be terminated if the parties no longer wish to participate in the mediation. The aforementioned circumstance is viewed in the academic literature through both a positive and a negative lens, taking into account the fact that, due to the principle of voluntariness, on the initiative of one of the parties, a mediation process may not be started at all, while one that has been initiated may be terminated for any reason whatsoever,²⁸ in which case mediation would be ineffective in this respect²⁹.

The imbalance of power, as one of the criteria applied in some of the practices of the countries analysed and which makes the mediation process in criminal justice impossible, is related to the imbalance of equality in the process, where the process would already be "entered" from different positions, which would make the mediation process impossible. The imbalance of power can be linked to socio-economic status, legal literacy or psychological motives, i.e. psychological and emotional pressure, which can be particularly pronounced in the case of mediation for crimes in which the accused and the victim are in a close relationship (e.g., family members, spouses).

The analysis of the use of mediation in criminal justice in different countries has also shown that, depending on the model used by the parties, the possibility of

²⁸ Legal Framework of Mediation in Belgium. Available: <https://mediation-net.eu/index.php/en/mediatziya/pravna-ramka/10-belgium/57-legal-frame-of-mediation-in-belgium> [last viewed 08.02.2025].

²⁹ Mediation in Croatia. Available: <https://www.mediation-help.com/en/about-mediation/horvatiya/> [last viewed 08.02.2025]; *Plevri, A.* Mediation in Cyprus, pp. 127–148.

initiating mediation varies, i.e., in one case, mediation can be initiated only at certain stages (usually before the start of the trial), or during the entire criminal proceedings, i.e., both at the pre-trial stage and at the trial stage. Even if mediation can be initiated at any stage of the criminal proceedings (the full model), there is procedural non-absoluteness, i.e., statutory grounds under which mediation in criminal proceedings is not possible and should be terminated.

5. Guidelines for establishing mediation in criminal justice

The term mediation is not used in Lithuanian criminal justice. Article 212(5) of the Code of Criminal Procedure of the Republic of Lithuania³⁰ (hereafter referred to as the CCP or the Code of Criminal Procedure) refers to reconciliation as one of the grounds for the discontinuance of a criminal case at the time of its preparation for trial (Article 235 of the Code of Criminal Procedure) and during the trial (Article 254(5) of the Code of Criminal Procedure).

Thus, although the current legal framework provides for the possibility of reconciliation in criminal proceedings, it cannot be equated or compared with mediation. Unlike mediation, reconciliation is more of a formal confirmation of the fact that the accused and the victim have reconciled. It does not seek to restore the balance between the accused and the victim that was disturbed by the offence, but is limited to confirming the fact of reconciliation as a ground for terminating the criminal proceedings.

Nor does the use of this process change the legal status of the accused as a participant in the proceedings, i.e., he or she continues to enjoy the status of a person with a criminal record, even after reconciliation, one of the grounds for the end of the criminal proceedings.

Reconciliation is also a ground for exempting a minor from criminal responsibility. A minor who has committed a criminal misdemeanour or a reckless or a minor or a petty or a petty crime for the first time may be released from criminal liability by the court if he or she has apologised to the victim and has made full or partial reparation for the damage or has eliminated the property damage caused by his or her work or by paying a sum of money (Art. 93(1)(1) of the Criminal Code³¹ of the Republic of Lithuania (hereafter referred to as the CC or the Criminal Code)).

Mediation is used not only in civil but also in criminal cases in various European countries, contributing to a more effective and harmonious resolution of conflicts and in criminal cases.³² It is important for governments that the programs used in the criminal justice process have the possibility to impact reoffending rates.³³ One such program is victim-offender mediation, in which victims and offenders involved in an offense get the opportunity to discuss the crime, ask questions, and come to an agreement on how to best solve the crime and view crime as a violation of the relationship between people, which can only be solved by active involvement

³⁰ Code of Criminal Procedure of the Republic of Lithuania (Official Gazette of the Republic of Lithuania, No. 37-1341, 2002).

³¹ Criminal Code of the Republic of Lithuania (Žin., No. 89-2741, 2000).

³² *Zhomartkyzy, M.* Comparative study of mediation practices in European countries. *EUREKA: Social and Humanities*, 5, 2023, p. 97.

³³ *Jonas-van Dijk, J., Zebel, S., Claessen, J. and Nelen, H.* Participation in Victim-Offender Mediation Predicts Less Reoffending: A Propensity Score Matched Case-Control Study. *Crime & Delinquency*, 2025, pp. 1–27. <https://doi.org/10.1177/00111287251335009>

of the main involved parties of a conflict – victim, offender, and the community.³⁴ The existing legal regulation of the institution of mediation in criminal justice in Lithuania, as well as the problems of its practical applicability, suggest that the institute of reconciliation in criminal justice does not achieve the true objectives of mediation.

In this context, it should be noted that as early as 2015, the Concept Paper emphasised that the development of conciliation/mediation in criminal proceedings could contribute to the development of the institution of reconciliation. The possibility of introducing mediation in criminal proceedings is also reflected in the works of criminal law scholars.³⁵

In its jurisprudence, the Constitutional Court has noted that the constitutional right to a fair trial implies, *inter alia*, not only that the principles and norms of criminal procedure law must be respected in the course of the trial, but also that the sentence prescribed by criminal law and imposed by the court must be fair; the criminal law must provide all possibilities for the court, taking into account all the circumstances of the case, to sentence a person who has committed an offence to a fair punishment. The Constitutional Court has also stated that the penalties and the system of penalties laid down in criminal law must be such as to enable the court to administer justice when imposing penalties.³⁶

The aforementioned case-law of the Constitutional Court should be viewed through the prism of the imposition of a fair, proportionate and effective punishment, which cannot be separated from the institute of exemption from criminal liability or the institute of a lighter sentence provided for in the criminal law.

In view of the above, it is appropriate to add articles to the CCP regulating the institution of mediation. The CCP should be supplemented by appropriate articles defining the grounds for the use of mediation in criminal proceedings, clearly identifying the stages of the criminal proceedings where such action is possible and other practical aspects. The introduction of such an institution into Lithuanian criminal justice would have a positive impact on criminal policy, not only in the sense that the use of mediation creates preconditions for the appropriate imposition of a sentence (in the event of a lighter sentence or exemption from criminal liability), but also in the sense that mediation could positively contribute to restoring the equilibrium between the perpetrator of the offence and the injured party.

The institution of mediation in criminal justice cannot be linked to the reconciliation institute already existing in the CCP, i.e., the mediation process must be completely independent. On the other hand, a successfully completed mediation process could serve as a basis for the termination of the criminal proceedings. Taking this into account, the current legal framework shows a shift towards a corresponding

³⁴ Jonas-van Dijk, J., Zebel, S., Claessen, J. and Nelen, H. Participation in Victim-Offender Mediation Predicts Less Reoffending: A Propensity Score Matched Case-Control Study. *Crime & Delinquency*, 2025, pp. 1–27. <https://doi.org/10.1177/00111287251335009>

³⁵ Michailovič, I., Bikelis, S., Čepas, A. [et al.] Perspectives of Restorative Justice in Lithuania. Research of the Lithuanian Law Institute. Šiauliai; *Giedrytė-Mačiulienė, R., Venckevičienė, J.* Implementation of mediation in probation services in Lithuania. *Legal Issues*, 2(92), 2016; Michailovič, I. Possibilities of Restorative Justice in Criminal Justice. Challenges of Globalization for Criminal Justice. A collection of peer-reviewed scientific articles on criminal law, execution of sentences and criminal procedure. Vilnius: Registrų centras, 2014; Liesis, M., Michailovič, I. Mediation in Lithuanian criminal and administrative misdemeanour justice at the trial stage. *Criminological Studies*, 2018; Uscila, R. Mediacijos taikymas baudžiamojoje justicijoje. XIII Kriminalistika ir teismo ekspertologija: mokslas, studijos, praktika. Vilnius: Lietuvos teisės institutas, Lietuvos teismo ekspertizės centras, 2017.

³⁶ Decisions of the Constitutional Court of 10 June 2003, 10 November 2005, 8 June 2009, 4 June 2012.

addition to both the CC and the CCP, as well as to the Law on Mediation of the Republic of Lithuania, which defines the institutes for the mediation of civil disputes and the mediation of administrative disputes, but not for the mediation of criminal ones.

It is also important that the inclusion of mediation in criminal justice should leave the parties free to enter into mediation at any stage of the criminal proceedings.

Based on the existing legal framework, which provides for cases where, for example, bail, mediation, as well as the applicable case law, it can be assumed that essentially the same offences and the same categories of offences could also be covered by the institution of mediation. Of course, in this context, it is also important to consider whether the use of mediation would be allowed for all offences. As discussed earlier in the article, in virtually all models (with some exceptions), the parties have provided for exceptions, i.e., offences for which mediation is not possible, irrespective of the model applied (full or partial). In principle, these limitations relate to the most sensitive types of offences, where the objectives of mediation could potentially be seen as difficult to achieve. The practice in the countries shows that these are mostly domestic violence cases, crimes of a sexual nature and cases where the interests of minors are at stake. In the light of the implementation of this institution, Article 80 of the CC provides for the criminal liability of minors, one of the purposes of which is to help the minor to change his lifestyle and behaviour by combining the punishment for the offence committed with the development of his personality, education, the elimination of the causes of his illegal behaviour, and the deterrence of the minor from committing new offences, ensuring that the liability is appropriate to his age and social maturity. Mediation in this context can therefore have a positive impact, both in terms of the emotional/psychological relationship with the offence committed and in terms of approaching the victim through the prism of empathy, thus contributing, among other things, to the objectives of Article 80 of the CC, not only in terms of punishment, but also, and most importantly, in terms of assisting the minor to change the way he live his life, and to do so in a way that is not punitive, as an end in itself, but through a different kind of 'inducement' to the committed offence, through the creation of a different kind of relationship which may have a positive impact on the development and upbringing of the minor, thereby creating an additional institute as a ground for exempting the minor (and not only the minor) from criminal responsibility as an *ultima ratio* measure.

In the context of the process of implementing mediation in the existing legal system and the practicability of such a process, it should be argued that the implementation of mediation in the existing legal system should not be a difficult process for several reasons. First of all, Lithuanian criminal law already has institutes (e.g., bail, reconciliation) which could be used to classify the same offences and the same categories of offences under which a mediation process could be initiated. Another reason is the already extensive network of mediators. In the context of the existing network of mediators, it should be noted that, according to the information provided on the website of the State Guaranteed Legal Aid Service, under the section List of mediators, there are no mediators who are specialised in criminal cases. In this context, it is appropriate to develop the competence and knowledge of mediators by allowing them to specialise in criminal cases, ensuring the sufficiency of training and the need for further training in this area. It should also be noted that the introduction of mediation in criminal justice would not require the creation of a new organisational system, case management or payment system, as these already

exist and would only be supplemented by the creation of additional mediation cases arising from criminal justice.

In conclusion, it is proposed to introduce mediation (which has been successful) as a ground for exemption from criminal liability in Chapter 4 of the CC (exemption from criminal liability). Also, a mediation clause should be included in Article 3 of the CCP (Circumstances preventing criminal proceedings), stipulating that criminal proceedings should not be initiated without the parties having first offered to initiate a mediation process and that only if the parties do not agree to participate in mediation prior to the start of the pre-trial investigation, should a pre-trial investigation be opened. It is also proposed to add a separate paragraph to Article 212 of the CCP (Cases of termination of pre-trial investigation) stating that the pre-trial investigation is terminated when the suspect and the victim successfully complete the mediation process during the pre-trial investigation, Article 232 of the CCP (orders made during the preparation of the case for trial), providing for the adjournment of the trial by referring the case to mediation, and Article 235 of the CCP (termination of the case), by including the successful completion of mediation as a ground for the termination of the judicial proceedings. This would ensure the fundamental principle of a full model of mediation in criminal justice, allowing the parties to initiate mediation both before the pre-trial investigation and throughout the criminal proceedings, including the trial.

Summary

Mediation in criminal justice is fragmented, with only a narrow range of applications, and the main reasons for this are the lack of legal regulation and the absence of a unified policy on the subject. One of the most important aspects of the mediation doctrine is the effectiveness of mediation, which is conditioned by the timely intervention in the dispute, the de-escalation of the conflict between the parties and the impact on both parties. For the victim, ensuring restitution, removing factors that contribute to insecurity and avoiding secondary or repeated victimization. For the perpetrator, avoiding stigmatization and criminal records, while at the same time creating conditions for reparation.

It should be noted that in 2023–2024, the use of mediation in the prisons of the Lithuanian Prison Service was extended. Current practice shows that there are about 30 mediations per year that are implemented in Lithuanian prisons. The application of mediation in the penitentiary system is dictated by the realization of the principle of restorative justice, i.e. compensating the victim, restoring constructive cooperative relations between the parties to the conflict, enabling the convicted person to demonstrate positive change and to evaluate it from the point of view of his resocialization.

The analysis of foreign countries on mediation in criminal justice has shown that the models used by countries can be divided into two main groups: those which apply a partial model of mediation in criminal justice and those which apply a full model of mediation in criminal justice. The difference between mediation models is essentially related to the stage of the process at which the parties can initiate mediation. Likewise, a review of mediation in criminal justice in foreign countries has shown that it is appropriate to introduce a model that covers all aspects of the offence, i.e., pre-trial, during and after the trial. An analysis of the use of mediation in criminal justice in different countries has demonstrated that, irrespective of the model used by the parties concerned, there are fundamental grounds on which the process is not possible.

The institution of mediation in criminal justice cannot be linked to the reconciliation institute already existing in the CPC, i.e., the mediation process must be completely independent. Successful completion of the mediation process could serve as a basis for the termination of the criminal proceedings. The incorporation of mediation into an existing criminal justice system should not be seen as a complicated process due to, e.g., an already existing organizational system, an existing network of mediators, a case management or payment system, etc.

The analysis offered in this paper indicates that the model of mediation in the probation system, which has been in place and implemented for nine years, has been fully successful and has become established in the mediation service system. In Lithuania, the probation system has introduced separate positions for mediators, and the staff work only on the mediation work assigned to them, although in practice it is common for mediators to be assigned additional functions related to the resocialization of convicted persons. It is important to mention that training and methodological tools have been developed to ensure the maintenance and continuity of the mediation model.

It is necessary to maintain the established model of mediation in the probation system, irrespective of the direction of the full development of mediation in criminal justice. However, in the future, it will be necessary to harmonize the legal regulation of the different areas of mediation in the criminal justice system. The development of a mediation system covering civil, administrative and criminal justice will require the harmonization of the legal regulation of both mediation and the content of other laws and sub-legislative acts.

A clearer and more coherent legal framework is necessary to develop the mediation model. The criminal law, i.e., the Criminal Procedure Code and the Criminal Code, should provide the legal basis for the use of mediation, specifying when it is possible, in which criminal offences and in relation to which persons, and the necessary conditions for mediation to be initiated.

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<https://doi.org/10.22364/jull.19.10>

The Right to Information in Criminal Proceedings Regarding the Confiscation of Criminally Acquired Property

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The authors of the current article examine the right to information in criminal proceedings regarding the confiscation of criminally acquired property. The paper provides a detailed overview of the legislative development in Latvia, with a focus on the evolution of Section 627 of the Criminal Procedure Law (CPL), as well as analysis of case law by the Constitutional Court. The authors explore the application of Directive 2014/42/EU, the role of judicial control, and the impact of procedural safeguards on the rights of affected persons. Particular attention is paid to procedural distinctions between different types of proceedings, including those initiated during pre-trial investigation. The findings highlight ongoing challenges in practice, despite improvements in legal regulation, emphasizing the importance of ensuring equal access to information for all parties involved in the confiscation of criminal assets.

Keywords: right to information, criminal procedure, confiscation of assets, fair trial, Constitutional Court, Directive 2014/42/EU.

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Introduction

In order to effectively defend their interests in criminal proceedings, every party must be informed of the substance of the allegations brought by the state. A person cannot meaningfully exercise their right to defence if they are not made aware, in due time, of the specific facts and claims they must respond to. This applies equally to formal charges as well as property-related aspects of the criminal case. This article focuses specifically on the right to information in criminal proceedings in relation to allegations by the state regarding the alleged criminal origin of property.

As is well known, the Criminal Procedure Law (hereinafter – CPL)¹ provides for the possibility to declare property as criminally acquired either through a final ruling in the criminal case or by means of a separate decision adopted during the pre-trial stage. Such a decision may be taken either within the special procedure set out in Chapter 59 of the CPL or, in specific cases, by the decision of the authority conducting the proceedings.

This article examines the scope of information available in each of these procedures to the person entitled to defence or the owner of the affected property – that is, the participant in the criminal proceedings whose property may be subject to confiscation as criminally acquired. The article also explores the legislative evolution of the CPL provisions concerning criminally acquired property, as well as recent Constitutional Court case law assessing whether the enacted legal amendments meet their legitimate aim and effectively safeguard the right to a fair trial. As a brief introduction, the article further considers the regulation of the special procedure in Chapter 59 of the CPL in conjunction with the fundamental right to a fair trial as guaranteed by the first sentence of Article 92 of the Constitution.²

The aim of this paper is to analyse the legal nature, scope and practical implementation of the right to access information in criminal proceedings, with particular emphasis on the interpretation provided by the Constitutional Court of Latvia and the European Court of Human Rights (hereinafter – ECtHR).

¹ Kriminālprocesa likums [Criminal Procedure Law] (21.04.2005). Available: <https://likumi.lv/ta/id/107820> [last viewed 09.05.2025].

² Latvijas Republikas Satversme [The Constitution of the Republic of Latvia] (15.02.1922). Available: <https://likumi.lv/ta/id/57980> [last viewed 09.05.2025].

1. Right to information in proceedings concerning criminally acquired property as an inherent component of the right to a fair trial

The first sentence of Article 92 of the Constitution of Latvia enshrines a fundamental personal right that permeates the entire criminal procedure, i.e. the right to a fair trial. As recognised by the Constitutional Court in its practice, the first sentence of Article 92 of the Constitution of Latvia guarantees the right of a person to have their “rights and legitimate interests” protected by a fair trial³ and the rights contained therein should be interpreted in light of Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms⁴ (hereinafter – the Convention).⁵ The right to a fair trial is one of the most fundamental rights, since the protection of other human rights and fundamental freedoms depends to a large extent on the proper protection of this right.⁶

Article 8(1) of Directive 2014/42/EU of the European Parliament and of the Council on freezing and confiscation of instrumentalities and the proceeds from crime in the European Union⁷ (hereinafter – Directive 2014/42/EU) provides that Member States shall take the necessary measures to ensure that persons affected by confiscation of property have the right to an effective remedy and a fair trial in order to protect their rights effectively. The sixth paragraph of this Article provides that Member States shall ensure that the person subject to confiscation has an effective possibility of judicial review of the confiscation order. One aim of the European Commission when this Directive was drafted was to improve the respect for the rights guaranteed by the EU Charter on Fundamental Rights by explicitly stating certain procedural rights. In order to avoid human rights violations, the case-law from ECtHR regarding measures of extended confiscation and non-conviction-based confiscation was considered.⁸

The understanding of the application of Article 8 of Directive 2014/42/EU in proceedings for criminally acquired property under Chapter 59 of the CPL has, however, been updated following the judgment of the Court of Justice of the European Union of 4 October 2024 in joined cases No. C-767/22, C-49 and C-161/23 *1Dream and Others*⁹ and the subsequent judgment of the Constitutional Court of 19 February

³ Judgement of the Constitutional Court of the Republic of Latvia of 23 April 2003 in case No. 2002-20-0103, para. 1. Available: https://www.satv.tiesa.gov.lv/wp-content/uploads/2016/02/2002-20-0103_Spriedums.pdf [last viewed 09.05.2025].

⁴ European Convention on Human Rights. Available: https://www.echr.coe.int/documents/d/echr/convention_ENG [last viewed 09.05.2025].

⁵ Judgement of the Constitutional Court of the Republic of Latvia of 19 October 2011 in case No. 2010-71-01, para. 12.1. Available: https://www.satv.tiesa.gov.lv/wp-content/uploads/2016/02/2010-71-01_Spriedums.pdf [last viewed 09.05.2025].

⁶ Latvijas Republikas Satversmes komentāri: VIII nodaļa. Cilvēka pamattiesības [Comments on the Constitution of the Republic of Latvia: Chapter VIII. Fundamental Rights of the Individual]. Collective authorship, led by Prof. R. Balodis. Rīga: Latvijas Vēstnesis, 2011, p. 124.

⁷ Directive (EU) 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union. Available: <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32014L0042> [last viewed 09.05.2025].

⁸ *Thunberg Schunke*, M. Extended Confiscation in Criminal Law. National, European and International Perspectives. Cambridge, Interesantia, 2017, p. 214.

⁹ Judgment of CJEU of 4 October 2024 in case No. C-767/22, C-49/23, C-161/23 *1Dream and others*. Available: <https://curia.europa.eu/juris/document/document.jsf?docid=290693&doclang=EN> [last viewed 09.05.2025].

2025 in case No. 2022-01-01¹⁰, the analysis of which will also be focused on in this study. At the same time, it is worth pointing out early on that the conclusions drawn on the non-applicability of Article 8 of Directive 2014/42/EU to proceedings for criminal property are debatable and contrary to the view that has existed in the practice of law creation and application so far. This is confirmed by the fact that the scope of Directive 2014/42/EU has so far been analysed both in previous decisions of the Constitutional Court¹¹ and in the amendments to the regulation of Chapter 59 of the CPL based on it.¹²

Proceedings for the confiscation of criminally acquired property are characterised by the fact that they do not examine the guilt of a person in committing a criminal offence, but rather the criminal origin of the property or its connection to a criminal offence.¹³ These proceedings are often referred to in Latvian practice as “special criminal proceedings”¹⁴, a term denoting their deviation from ordinary adjudicative processes due to their limited substantive focus. It should be pointed out at once that proceedings for criminal property which deal with issues relating to property could be referred to as *quasi-criminal in nature*, since they deal essentially only with property issues and apply Article 124 of the CPL. The standard of proof set out in Article 124(6), which is different from the standard of proof in the main criminal proceedings – “preponderance of the evidence” (in criminal proceedings and proceedings concerning criminally acquired property, the circumstances that are the subject of proof concerning the criminal origin of the property shall be deemed to be proven if, in the course of proof, there are grounds for recognising that the property is more likely than not to have criminal than lawful origins).

Since proceedings for criminal property concern the property rights of the persons referred to in Article 628 of the CPL, such proceedings are essentially deal with issues related the civil rights and obligations of persons within the meaning of the first paragraph of Article 6 of the Convention, as recognised by the ECtHR in its case

¹⁰ Judgement of the Constitutional Court of the Republic of Latvia of 19 February 2015 in case No. 2022-01-01. Available: https://www.satv.tiesa.gov.lv/wp-content/uploads/2022/01/2022-01-01_Spriedums_krim_proc_-_jepzisanas-ar-lietas-materialiem.pdf [last viewed 09.05.2025].

¹¹ Judgement of the Constitutional Court of the Republic of Latvia of 23 May 2017 in case No. 2016-13-01, para. 10. Available: https://www.satv.tiesa.gov.lv/wp-content/uploads/2016/07/2016-13-01_Spriedums.pdf [last viewed 09.05.2025], see also Judgement of the Constitutional Court of the Republic of Latvia of 11 October 2017 in case No. 2017-10-01, para. 20.1. Available: https://www.satv.tiesa.gov.lv/wp-content/uploads/2017/04/2017-10-01_Spriedums-1.pdf [last viewed 09.05.2025].

¹² Grozījumi Kriminālprocesa likumā [Amendments to Criminal Procedure Law] (22.06.2017). Available: <https://likumi.lv/ta/id/292018> [last viewed 09.05.2025]. See also Explanatory Note to the Draft Law “Amendments to the Criminal Procedure Law”. Available: <https://titania.saeima.lv/LIVS12/SaeimaLIVS12.nsf/0/AB2871419A747C7FC2258011002DD2FA?OpenDocument> [last viewed 09.05.2025].

¹³ Judgement of the Constitutional Court of the Republic of Latvia of 23 May 2017 in case No. 2016-13-01, para. 10. Available: https://www.satv.tiesa.gov.lv/wp-content/uploads/2016/07/2016-13-01_Spriedums.pdf [last viewed 09.05.2025].

¹⁴ See Judgement of the Supreme Court of the Republic of Latvia of 29 February 2009 in case No. SKK-2/2009. Available: <https://www.at.gov.lv/lv/tiesu-prakse/judikaturas-nolemumu-arhivs/kriminallietu-departaments/klasifikators-pec-lietu-kategorijam/kriminalprocesa-likums/59nodala-process-par-noziedzigi-iegutu-mantu-626-631pant> [last viewed 09.05.2025]; see also Judgement of the Constitutional Court of the Republic of Latvia of 23 May 2017 in case No. 2016-13-01, para. 11. Available: https://www.satv.tiesa.gov.lv/wp-content/uploads/2016/07/2016-13-01_Spriedums.pdf [last viewed 09.05.2025].

law.¹⁵ Accordingly, in proceedings concerning criminal property, the guarantees of the right to a fair trial are applicable to the persons connected with the property.¹⁶ It is generally accepted that the introduction of the special procedure had and has in itself its own specific purpose: to resolve the matter in question more quickly, without waiting for the main proceedings to be brought before the courts. However, this goal cannot justify a limitation on the core procedural guarantees enshrined in Article 92 of the Constitution. The resolution of the same criminal procedural issue by a court should not be different.¹⁷ It is therefore only natural that a person's right to a fair trial should also be guaranteed in proceedings concerning criminal property. This is linked to the person's ability to fully protect his or her right to property.¹⁸ However, the traditional distinction between criminal and non-criminal sanctions is definitely challenged when measures traditionally elaborated within the criminal law realm (confiscation measures) are applied in another context, without full application of the safeguards offered by criminal justice. Nevertheless, in any jurisdiction – both national and supranational – the borders of criminal law are increasingly blurred, and it cannot be denied that in many administrative and private law sanctions have a punitive dimension, too.¹⁹

It can be concluded that in proceedings concerning criminally acquired property, the right to a fair trial of the persons related to the property is fully guaranteed, including both the right of the parties to the proceedings to access the case file and the right to appeal against decisions on confiscation of property. This right to information and access to the case file is related to an element of the right to a fair trial such as the equivalence of procedural powers. The principle of equality of procedural means is an element of both the right to a fair trial and the principle of legal equality. It requires that the rights of the parties to a proceeding be fairly balanced (appropriate balance), i.e., that everyone be afforded adequate opportunities to avail themselves of procedural remedies without being unduly disadvantaged in comparison with the other parties to the proceeding.²⁰ The principle of the protection of the rights of persons having an interest in property implies the right to be heard and comprises three elements: (1) the right to information (the obligation on the court to inform the parties to the proceedings of all statements made, evidence gathered and the circumstances of the case, etc.); (2) the right to be heard (the obligation to give the parties to the proceedings the opportunity to express themselves at a minimum, in writing on issues of fact and law); (3) the right for the court to take into account

¹⁵ Judgement of 12 May 2015 of the European Court of Human Rights in case *Gogitidze and Others v. Georgia*, No. 36862/05, para. 121. Available: <https://hudoc.echr.coe.int/eng?i=001-154398> [last viewed 09.05.2025], see also Judgement of 10 April 2012 of the European Court of Human Rights in case *Silickiene v. Lithuania*, No. 20496/02, para. 45–46. Available: <https://hudoc.echr.coe.int/eng?i=001-110261> [last viewed 09.05.2025], see also Judgement of the Constitutional Court of the Republic of Latvia of 23 May 2017 in case No. 2016-13-01, para. 10. Available: https://www.satv.tiesa.gov.lv/wp-content/uploads/2016/07/2016-13-01_Spriedums.pdf [last viewed 09.05.2025].

¹⁶ Judgement of the Constitutional Court of the Republic of Latvia of 23 May 2017 in case No. 2016-13-01, para. 11. Available: https://www.satv.tiesa.gov.lv/wp-content/uploads/2016/07/2016-13-01_Spriedums.pdf [last viewed 09.05.2025].

¹⁷ *Kūtris, G. Mantas atzišana par noziedzīgi iegūtu un rīcība ar to pirmstiesas procesā* [Recognition of property as criminally obtained and handling thereof in pre-trial proceedings]. Doctoral thesis, 2024, p. 90. Available <https://dspace.lu.lv/dspace/handle/7/65586> [last viewed 09.05.2025].

¹⁸ *Ibid.*, p. 89.

¹⁹ *Ligeti, K. K., Simonato, M. Chasing Criminal Money. Challenges and Perspectives on Asset Recovery in the EU*. Oxford, Hart Publishing, 2017, p. 9.

²⁰ *Reid, K. A practitioner's guide to the European Convention on Human Rights*. 3rd ed. London, Sweet & Maxwell, 2008, p. 67.

the submissions of the parties in the reasons for its decision. In proceedings concerning the proceeds of crime, the participation of interested persons who are not accused but whose rights may be affected by the confiscation of property is based on the right to be heard.²¹ This aspect is related to the issue to access of evidence and other materials. In criminal cases it means that both prosecution and defence should generally be given the opportunity to obtain information and comment on the observations filed and the evidence adduced by the other party, but also that the prosecution authorities should disclose to the defence all material evidence in their possession for or against the accused. It is, for example, important that the confiscation subject receives information on financial investigations or other evidence that may be important for effectively challenging a confiscation claim.²²

As an aside, it should be mentioned that the possibility of appealing against a confiscation order is another topical issue that has been encountered in practice by those applying the norms and has been assessed by the Constitutional Court in its recent case law²³, however, the analysis of this issue should be given its own attention and will be left for another time.

Returning to the topic of the study on the right to information in proceedings for criminally acquired property, the currently applicable Article 627(4) of the CPL provides that the materials contained in the proceedings for criminally acquired property are investigative secrets and may be consulted by the parties to the proceedings, without jeopardising the fundamental rights of the persons mentioned in the evidence, ensuring the protection of public interests and without jeopardising the achievement of the purpose of the criminal proceedings from which the materials were extracted. However, the cited provision was introduced in this scope only by the amendment of 6 October 2022, which entered into force on 3 November 2022.²⁴ Until then, there were different understandings among both legal practitioners and enforcers as to the scope and enforcement of the right of persons to receive information in proceedings concerning criminal property. It is therefore necessary to continue the article by examining the historical framework and development of the CCL from its adoption to the most recent amendments.

2. Historical development of the right to access materials in proceedings concerning criminally acquired property under the Criminal Procedure Law

This issue appears to be most comprehensively addressed in the CPL with regard to the recognition of property as criminally acquired during pre-trial proceedings in accordance with the procedure provided for in Chapter 59 of the CPL.

²¹ *Kolomijceva, J.* Kriminālprocesa likuma 59. nodaļas process par noziedzīgi iegūtu mantu [Chapter 59 of the Criminal Procedure Law on proceedings concerning criminally acquired property]. *Jurista Vārds*, No. 7(550), 17.02.2009. Available: <https://juristavards.lv/zurnals/187714-kriminalprocesa-likuma-59nodalas-process-par-noziedzigi-iegutu-mantu/> [last viewed 09.05.2025].

²² *Boucht, J.* The Limits of Asset Confiscation. On the Legitimacy of Extended Appropriation of Criminal Proceeds. Oxford, Hart Publishing, 2017, p. 203.

²³ Judgement of the Constitutional Court of the Republic of Latvia of 16 April 2025 in case No. 2021-44-01. Available: https://www.satv.tiesa.gov.lv/wp-content/uploads/2021/12/2021-44-01_parsudziba-procesa-par-NIM-1.pdf [last viewed 09.05.2025].

²⁴ *Grozījumi Kriminālprocesa likumā* [Amendments to Criminal Procedure Law] (06.10.2022). Available: <https://likumi.lv/ta/id/336542> [last viewed 09.05.2025].

The current Article 627(2) of the CPL prescribes quite precisely the scope of the information to be included in the decision to initiate proceedings for criminally acquired property, namely:

- 1) the facts which substantiate the connection of the property with a criminal offence or the criminal origin of the property, as well as the case files which substantiate the existence of such information and are separated from the criminal case under investigation for a criminal offence;
- 2) which persons are linked to the property in question;
- 3) the proposed disposition of the proceeds of crime;
- 4) the victim, if any.

In the original version of the CPL, the legislator included in the second part of Article 627 of the CPL a list of information to be included in the decision to initiate proceedings for criminal property and to refer the criminal case to court. Until 11 August 2011, when the first amendments to Article 627 of the CPL entered into force, Chapter 59 of the CPL did not provide for the right of the parties to the proceedings to inspect the materials of the proceeding on proceeds of crime. However, in the following years, the norm has evolved rapidly, taking into account both the amendments made on several occasions and the constitutional complaints and rulings before the Constitutional Court, which have had a significant impact on the current regulation of Chapter 59 of the CCL, including the right of the parties to proceedings to information in proceedings for proceeds of crime. In the Republic of Latvia, the constitutional complaint has proved to be an effective tool not only for the protection of fundamental human rights, but also for the impetus given to the process of evolution of the legal system.²⁵

Since the adoption and entry into force of the CPL, this law has been amended four times in relation to the right to information in proceedings for criminal property.

2.1. Amendments of 8 July 2011

On 8 July 2011²⁶ pursuant to the proposal of the Minister of Justice, the *Saeima* approved in the third reading amendments to Article 627(2)(1) of the CCL, the paragraph 2(2) of Article 627(2) of the Criminal Procedure Code was amended and the provision was editorially clarified and expanded by stipulating that in the decision to initiate proceedings for criminally acquired property the authority conducting the proceedings shall not only indicate which materials from the criminal case on a criminal offence under investigation are being separated in the case for criminally acquired property, but also indicate information on facts that substantiate the property's connection to a criminal offence or the property's criminal origin.²⁷

However, the most important part of these amendments is that since their entry into force, Article 629(5) of the CPL has been supplemented with a new provision stipulating that the materials contained in the case file of proceedings for proceeds of crime are investigative secrets and may be consulted by the investigating authority,

²⁵ *Di Capua, V.* The Protection of Fundamental Rights by the Constitutional Court in the Republic of Latvia. Perspectives, Opportunities and Limits of an Introduction of the Model in Italy. *Journal of the University of Latvia. Law*, 16, 2023, p. 208. Available: <https://doi.org/10.22364/jull.16.12> [last viewed 28.07.2025].

²⁶ *Grozījumi Kriminālprocesa likumā [Amendments to Criminal Procedure Law] (08.07.2011).* Available: <https://likumi.lv/ta/id/233716> [last viewed 09.05.2025].

²⁷ Table of Proposals for the Draft Law "Amendments to the Criminal Procedure Law" (No. 339/Lp10). Available: <https://titania.saeima.lv/LIVS10/SaeimaLIVS10.nsf/0/6E0D6448CE1B28D2C22578C3001E2B2D?OpenDocument> [last viewed 09.05.2025].

the prosecutor and the court hearing the proceedings for proceeds of crime. On the other hand, persons related to the property may inspect the materials in the case with the permission of the authority conducting the proceedings and to the extent determined by him.²⁸ It can be inferred from the proposal of the Ministry of Justice on the necessity of the amendments submitted to the Legal Affairs Committee of the *Saeima* alone that they were drafted because in practice until that time different understandings had developed as to whether the materials of proceedings on criminally acquired property were to be considered as investigative secrets and whether they could be consulted only with the permission of the authority conducting the proceedings.²⁹ In order to establish a provision by analogy with Article 396(1) of the CPL, which establishes the procedure for persons to be acquainted with the investigation secret in pre-trial criminal proceedings, the Ministry of Justice initiated such a regulation in Article 629(5) of the CPL, which was supported by the legislator.³⁰

2.2. Amendments of 22 June 2017

On 22 June 2017³¹, pursuant to the proposal of the Minister of Justice, the *Saeima* approved in the second reading amendments to the first part of Article 627 of the CPL, by editorially replacing the word “criminal case” with the word “materials”, as well as by supplementing the second part with paragraph 4, providing that in the decision to initiate proceedings for criminally acquired property, the authority conducting the proceedings shall indicate the victim, if any.³² These amendments broadened the scope of the decision to initiate proceedings for criminally acquired property, but overall they can be regarded as editorial amendments which did not significantly affect the right of a person to information in proceedings for criminally acquired property.

2.3. Amendments of 20 June 2018

On 20 June 2018, Article 627 of the CPL was supplemented. On the other hand, the persons related to the property were granted the right to request the authority conducting the proceedings to allow them to have access to the materials contained in the proceedings for criminal property to the extent determined by the authority, and in case of rejection of the request, the right to appeal against such decision to the district (city) court.³³

These amendments moved the regulation on the access of parties to proceedings to the materials in the proceedings for criminal property, previously introduced in

²⁸ Table of Proposals for the Draft Law “Amendments to the Criminal Procedure Law” (No. 339/Lp10). Available: <https://titania.saeima.lv/LIVS10/SaeimaLIVS10.nsf/0/6E0D6448CE1B28D2C22578C3001E2B2D?OpenDocument> [last viewed 09.05.2025].

²⁹ Proposals by the Ministry of Justice of the Republic of Latvia of 21 June 2011 for the Draft Law “Amendments to the Criminal Procedure Law” (Reg. No. 339/Lp10). Available: [https://titania.saeima.lv/LIVS10/SaeimaLIVS10.nsf/0/73d4418a92c0cc78c22578b6003cb839/\\$FILE/2_1982.pdf](https://titania.saeima.lv/LIVS10/SaeimaLIVS10.nsf/0/73d4418a92c0cc78c22578b6003cb839/$FILE/2_1982.pdf) [last viewed 09.05.2025].

³⁰ Ibid.

³¹ Grozījumi Kriminālprocesa likumā [Amendments to Criminal Procedure Law] (22.06.2017). Available: <https://likumi.lv/ta/id/292018> [last viewed 09.05.2025].

³² Table of Proposals for the Draft Law “Amendments to the Criminal Procedure Law” (No. 630/Lp12). Available: <https://titania.saeima.lv/LIVS12/SaeimaLIVS12.nsf/0/0A74FBD43BC5C2ABC22580DE004BA227?OpenDocument> [last viewed 09.05.2025].

³³ Grozījumi Kriminālprocesa likumā [Amendments to Criminal Procedure Law] (20.06.2018). Available: <https://likumi.lv/ta/id/300107> [last viewed 09.05.2025].

Article 629(5) of the CPL, to Article 627(4) of the CPL. As it follows from the proposal for amendments drafted by the Ministry of Justice, Section 629(5) of the CCL was moved to Section 627(4) of the CCL in order to harmonise the provisions, while the amendments to Section 627(5) of the CCL were necessary in the light of the Constitutional Court's judgment of 23 May 2017 in case No. 2016-13-01 (initiated on the constitutional complaint of SIA "Cell Finance"), by which the fifth part of Article 629 of the CCL, insofar as the court cannot reassess the legality and reasonableness of the decision of the authority conducting the proceedings on the right of a person to have access to the materials of the proceedings on criminally acquired property, was declared incompatible with the first sentence of Article 92 of the Constitution of the Republic of Latvia.³⁴

The authors of the current article will focus on this judgment of the Constitutional Court later in the study. Following the Constitutional Court's judgment, including that the legislator should provide for a procedure ensuring the principle of equal opportunities of the parties in proceedings for criminally acquired property, the Ministry of Justice initiated amendments to Article 627 of the CPL, primarily providing for the right of the court to review the lawfulness of the decision of the authority conducting the proceedings on the right of a person to inspect the materials of proceedings for criminally acquired property. Although the proposal of the Ministry of Justice stated that it was drafted taking into account possible cases when the authority conducting the proceedings does not grant access to the materials of the proceedings for criminal property, because the information contained therein may reveal the content of the materials of the main criminal proceedings, thus jeopardising the progress of the main proceedings,³⁵ the most important problem related to the respect of the rights of the participants in the proceedings was not eliminated by these amendments. This is confirmed by the problems identified in practice, when the authority conducting the proceedings refused to present the materials, by the subsequent amendments to Article 627 of the CPL and by the recent case-law of the Constitutional Court.

2.4. Amendments of 6 October 2022

On 6 October 2022 Article 627 of the CPL was amended in relation to the accessibility to the parties of the criminal case materials distributed in the proceedings for proceeds of crime, based on the opinion of the Ombudsman of the Republic of Latvia of 6 April 2021 in the examination case No. 2020-40-4AD, which assessed the implementation of the proceedings for proceeds of crime set out in Chapter 59 of the CPL in accordance with the requirements of Directive No. 2014/42/EU.³⁶

As stated in the annotation to the draft law, Section 627(2)(1) of the CPL was again editorially clarified by stipulating that the decision of the authority conducting the proceedings must indicate specific case materials substantiating the information

³⁴ Proposals for the Draft Law "Amendments to the Criminal Procedure Law" (Reg. No. 1000/Lp12) before the Second Reading. Available: <https://titania.saeima.lv/LIVS12/SaeimaLIVS12.nsf/0/B7BAB9DBF812AB14C22581B0002EB9AA?OpenDocument> [last viewed 09.05.2025].

³⁵ Ibid.

³⁶ Grozījumi Kriminālprocesa likumā [Amendments to Criminal Procedure Law] (06.10.2022). Available: <https://likumi.lv/ta/id/336542> [last viewed 09.05.2025].

on the origin of the property.³⁷ On the other hand, with regard to the restriction on access to materials of criminally acquired property contained in Article 627(4) of the CPL, the annotation to the draft law stated that in practice there are shortcomings which generally hinder the progress of the proceedings, and therefore it is necessary to establish a different procedure for the parties to the proceedings to access the materials.³⁸ Moreover, the annotation of the draft law stressed that in order to ensure the right to a fair trial of a person, including the owner of the property, and the equality of the parties, it is not permissible for a court to take a decision on the recognition of property as criminally acquired on the basis of evidence that is not available to the parties.³⁹ Similarly, in the annotation to the draft law, the Ministry of Justice also referred to the judgment of the ECtHR of 28 August 1991 in the case *Brandstetter v. Austria*⁴⁰, which was not new in the case law of the ECtHR in 2022, to justify the need for such amendments.

In the authors' opinion, by including in the annotation of the draft law a reference to the abovementioned judgement of the Constitutional Court of 23 May 2017 in case No. 2016-13-01, the Ministry of Justice has essentially acknowledged that the earlier amendments to Article 627(4) and (5) of the CCL, although they were made in order to comply with the conclusions of the judgement of the Constitutional Court, have not achieved its objective, including, at least in practice, not ensuring the right of persons to access and review the materials of proceedings on criminal property and compliance with the equality of parties.

In view of the above, a substantial amendment was initiated to Article 627(4) of the CPL, providing that the materials referred to in the decision to initiate proceedings in respect of criminally acquired property may be consulted by the parties to the proceedings, ensuring that the fundamental rights of the persons referred to in the evidence are not jeopardised, that the public interest is protected and that the purpose of the criminal proceedings from which the materials were extracted is not jeopardised.⁴¹

It can be concluded that, after a long development and several amendments, Section 627(4) of the CPL provides for the right of all parties to the proceedings to have access to the materials distributed in the proceedings on criminally acquired property brought before the court. Only with the introduction of the latest amendments has the right to information of the parties to proceedings for the confiscation of criminally acquired property been fully and comprehensively ensured, but until then, although the legal regulation existed for more than 10 years and grammatically stipulated the existence of such a right, in practice there were certain problems with the actual provision of this right.

The constitutional court is not the only instrument for protecting human rights. However, *erga omnes* nature of its judgement makes it special. Enforcement

³⁷ Explanatory Note to the Draft Law "Amendments to the Criminal Procedure Law" (Reg. No. 1323/Lp13). Available: <https://titania.saeima.lv/LIVS13/SaeimaLIVS13.nsf/0/1493B4CCDCBD851EC22587DB0029DF4D?OpenDocument> [last viewed 09.05.2025].

³⁸ Ibid.

³⁹ Ibid.

⁴⁰ Judgement of 28 August 1991 of the European Court of Human Rights in case *Brandstetter v. Austria*, Nos. 11170/84, 12876/87 and No. 13468/87. Available: <https://hudoc.echr.coe.int/eng?i=001-57683> [last viewed 09.05.2025].

⁴¹ Explanatory Note to the Draft Law "Amendments to the Criminal Procedure Law" (Reg. No. 1323/Lp13). Available: <https://titania.saeima.lv/LIVS13/SaeimaLIVS13.nsf/0/1493B4CCDCBD851EC22587DB0029DF4D?OpenDocument> [last viewed 09.05.2025].

of a judgement delivered by the Latvian Constitutional Court is presumable. The enforcement of its judgements follows from the principle of a state governed by the rule of law.⁴² Therefore, taking into account the importance of the Constitutional Court's conclusions in initiating amendments to Article 627 of the CCL, it is worth examining them in the framework of the study and finding out whether the legislator, by drafting amendments to Article 627(4) of the CCL, insofar as it provides for the right of the parties to the proceedings to access the case file of criminally acquired property, has ensured the right of the parties to the proceedings to a fair trial.

3. Constitutional Court case law regarding the compatibility of Section 627(4) and Section 629(5) of the Criminal Procedure Law with the first sentence of Article 92 of the Constitution

3.1. Judgment in case No. 2016-13-01

The starting point of this analysis is the judgment of the Constitutional Court of 23 May 2017 in case No. 2016-13-01, which was initiated upon the constitutional complaint of SIA "Cell Finance".⁴³ The applicant applied to the Constitutional Court, considering that Section 629(5) of the CCL, insofar as it restricts the right of a person related to property to access the case file of proceedings on criminally acquired property, does not comply with the first sentence of Article 92 of the Constitution of Latvia or disproportionately restricts the right to a fair trial, which also includes the principle of equal opportunities of the parties.⁴⁴ On the contrary, the *Saeima*, as the institution that issued the contested act, indicated that the infringement of the applicant's fundamental rights was caused not by the contested norm itself, but by the practice of its application, since the extent of the exercise of the specific right in each case depended on the decision of the authority conducting the proceedings.⁴⁵

In the context of the study, the judgment of the Constitutional Court of 23 May 2017 is significant because it was the first to assess the significance of the materials contained in the proceedings on criminal property as a secret of the investigation in relation to the right to a fair trial of the participants involved in the proceedings. Undoubtedly, the legislator's aim in adopting the contested norm was to clearly establish that the materials contained in the proceedings on criminally acquired property are to be regarded as an investigative secret, however, the Constitutional Court had to ascertain whether the right of the authority conducting the proceedings to decide on the extent to which persons related to property are to be acquainted with the materials of the proceedings on criminally acquired property, granted by the legislator, ensures the right to a fair trial of those persons.

In this respect, the Constitutional Court, when assessing the practice of application of the contested norm, recognised that the decision of the authority conducting the proceedings on the right of a person related to property to access the case file in the proceedings on criminally acquired property was not subject to judicial review at

⁴² *Rodiņa, A., Kārklīņa, A.* 25 Years of Fundamental Rights in the Constitution of the Republic of Latvia: Development, Significance and Content. *Journal of the University of Latvia. Law*, 16, 2023, p. 43. Available: <https://doi.org/10.22364/jull.16.02> [last viewed 28.07.2025].

⁴³ Judgement of the Constitutional Court of the Republic of Latvia of 23 May 2017 in case No. 2016-13-01. Available: https://www.satv.tiesa.gov.lv/wp-content/uploads/2016/07/2016-13-01_Spriedums.pdf [last viewed 09.05.2025].

⁴⁴ *Ibid.*, para. 2.

⁴⁵ *Ibid.*, para. 3.

that time, i.e. the court did not assess the lawfulness and substantiation of the adopted decision. That is why the Constitutional Court, contrary to the opinion of the *Saeima*, held that it was the absence of an appeal procedure, and not the practice of application of the norm, that affected the applicant's fundamental rights under the first sentence of Article 92 of the Constitution of Latvia.⁴⁶

On the contrary, when assessing whether the procedure included in the contested norm for persons related to property to access the case file of proceedings on criminally acquired property and whether such procedure ensures the right of such persons to a fair trial, the Constitutional Court concluded that a person who disagrees with the decision of the authority conducting the proceedings has the right to appeal against such decision within the prosecutor's office, however, in view of the procedural deadlines regulated by the procedure on criminally acquired property, such appeal procedure cannot be considered effective for protection of fundamental rights.⁴⁷

In the same judgment, the Constitutional Court analysed in detail the principle of equal opportunities of the parties arising from the concept of a fair trial, which provides that all the parties involved have the opportunity to present the facts of the case and prohibits any party from being granted a substantial advantage over its opponent.⁴⁸ The Constitutional Court's conclusions that in special criminal proceedings for criminal property the principle of equal opportunities of the parties must be respected and at the same time the protection of the secrecy of the investigation must be ensured⁴⁹ not only initiated the amendments to Article 627(4) of the CPL already discussed, but were also widely used in practice, both by the parties to the proceedings arguing for the introduction of the case file and by the prosecutors refusing to do so.

Although the Constitutional Court recognised that the contested norm, in so far as it did not ensure compliance with the principle of equal opportunities of the parties, did not comply with the first sentence of Article 92 of the Constitution of Latvia, it applied its conclusions only to the absence of a judicial review function. On the other hand, with regard to the existing practice, when the persons directing the proceeding most often refused to acquaint the persons with the materials of the proceedings on criminal property, the Constitutional Court concluded that it was only the authority conducting the proceedings who was competent to decide whether and which materials should be shown to the person, while respecting the need to protect the secrecy of the investigation.⁵⁰

It can be concluded that, although the judgment of the Constitutional Court of 23 May 2017 in case No. 2016-13-01 contains a substantial assessment of the right of persons to a fair trial, it only initiated amendments to the fourth and fifth parts of Article 627 of the CPL, providing for the procedure of judicial appeal against the decision of the authority conducting the proceedings on refusal to

⁴⁶ Judgement of the Constitutional Court of the Republic of Latvia of 23 May 2017 in case No. 2016-13-01, para. 11. Available: https://www.satv.tiesa.gov.lv/wp-content/uploads/2016/07/2016-13-01_Spriedums.pdf [last viewed 09.05.2025].

⁴⁷ *Ibid.*, para. 13.

⁴⁸ See also: Judgement of the Constitutional Court of the Republic of Latvia of 16 April 2015 in case No. 2014-13-01, para. 20.1. Available: https://www.satv.tiesa.gov.lv/wp-content/uploads/2016/02/2014-13-01_Spriedums.pdf [last viewed 09.05.2025].

⁴⁹ Judgement of the Constitutional Court of the Republic of Latvia of 23 May 2017 in case No. 2016-13-01, para. 14. Available: https://www.satv.tiesa.gov.lv/wp-content/uploads/2016/07/2016-13-01_Spriedums.pdf [last viewed 09.05.2025].

⁵⁰ *Ibid.*, para. 15.3.

present the materials of the proceedings on criminally acquired property. However, the problems of practice, in which a person related to property was not ensured the right to access the case file of the proceedings on criminally acquired property and to effectively exercise the rights contained in the CCL, including the right to information and respect for the principle of equality of parties, were not eliminated by the above mentioned judgment of the Constitutional Court and the subsequent amendments to the CCL.

3.2. Judgment in case No. 2017-10-01

For the second time this issue was assessed in the practice of the Constitutional Court in the judgment of 11 October 2017 in case No. 2017-10-01, which was initiated following the constitutional complaint of “IMEX PROVIDER LTD” on compliance of Section 629(5) of the CCL with the first sentence of Article 92 of the Constitution of Latvia.⁵¹ In this case, the applicant also applied to the Constitutional Court, considering that Section 629(5) of the CPL disproportionately restricts the right to a fair trial, as it does not ensure the possibility to access the case file in the proceedings on criminally acquired property. The authorisation to inspect the case file depends solely on the subjective opinion of the authority conducting the proceedings, and in proceedings for criminal property the authority has a significant advantage over the person whose property origin or connection with a criminal offence is at issue.⁵²

The Constitutional Court concluded that in its judgement in case No. 2016-13-01 it had already recognised Section 629(5) of the CPL, insofar as the court cannot reassess the legality and reasonableness of the decision of the authority conducting the proceedings on the right to access the case file of the proceedings on criminally acquired property, as incompatible with the first sentence of Article 92 of the Constitution of Latvia, thus it did not reassess the infringement of this fundamental right in the given case.⁵³ At the same time, this judgment confirms that in a short period of time after the judgment of the Constitutional Court in case No. 2016-13-01, the issue of the scope of Section 629(5) of the CPL was raised again, insofar as the norm in essence provides for the right of the parties to the proceedings to familiarize themselves with the materials of proceedings on criminally acquired property, but in practice it was not possible to effectively exercise this right.

Although the Constitutional Court in the cases No. 2016-13-01 and 2017-10-01 recognised the non-compliance of Section 629(5) of the CCL with the first sentence of Article 92 of the Constitution of Latvia, its assessment was applicable only to the absence of an effective appeal procedure in the then regulation of Chapter 59 of the CCL, but not to the right of a person to information in criminal proceedings, which includes the right to access all the case file in the proceedings for criminal property. In other words, the conclusions of the Constitutional Court's judgment and the subsequent amendments of 20 June 2018 to Articles 627 and 629 of the CPL⁵⁴ did not achieve the purpose of the constitutional complaints.

⁵¹ Judgement of the Constitutional Court of the Republic of Latvia of 11 October 2017 in case No. 2017-10-01, para. 20.1. Available: https://www.satv.tiesa.gov.lv/wp-content/uploads/2017/04/2017-10-01_Spriedums-1.pdf [last viewed 09.05.2025].

⁵² *Ibid.*, para. 3.

⁵³ *Ibid.*, para. 15.1.

⁵⁴ Grozījumi Kriminālprocesa likumā [Amendments to Criminal Procedure Law] (20.06.2018). Available: <https://likumi.lv/ta/id/300107> [last viewed 09.05.2025].

Within the framework of the current study, it is also worth examining the recent case law of the Constitutional Court on the regulation of Chapter 59 of the CCL, insofar as it relates to the issue under consideration. It should be noted that in the first half of 2025, the Constitutional Court has added to its collection of decisions several long-awaited judgments in proceedings for the confiscation of criminally acquired property.

3.3. Judgment in case No. 2022-01-01

For the third time in the practice of the Constitutional Court the issue of compliance of the fourth and fifth parts of Section 627 of the CCL with the first sentence of Article 92 of the Constitution of Latvia was assessed in the judgement of the Constitutional Court of 19 February 2025 in case No. 2022-01-01.⁵⁵ The applicants of the Constitutional Complaint challenged the aforementioned norms, arguing that the person related to the property may be denied access by the authority conducting the proceedings to the case materials, which are the basis for the his allegations on the criminal origin of the property, and thus put the person in a disadvantageous situation compared to the other party.⁵⁶ The applicants of the constitutional complaints drew the attention of the Constitutional Court to the fact that, notwithstanding the judgment of the Constitutional Court in case No. 2016-13-01 analysed above and the conclusions drawn therein, the principle of equal opportunities of the parties was still infringed in practice, as the person directing the proceedings denied access to a significant part of the documents attached to the decision on initiating proceedings on criminally acquired property and referring them to the court for decision.⁵⁷

It is significant that in this case the Constitutional Court decided to refer the matter to the Court of Justice of the European Union for a preliminary ruling. On 4 October 2024, the Court of Justice of the European Union delivered its judgment in joined cases No. C-767/22, C-49/23 and C-161/23, holding that Directive 2014/42/EU and Framework Decision 2005/212/JHA must be interpreted as not falling within the scope of those provisions national legislation providing for the possibility, in the course of criminal proceedings aimed at establishing whether a person has committed a criminal offence, to initiate proceedings for the confiscation of property.⁵⁸

In the view of the Court of Justice of the European Union and later in the Constitutional Court's ruling, the view was taken that the provisions of Directive 2014/42/EU were not applicable to proceedings for proceeds of crime under Chapter 59 of the CCL. In conclusion, this is a rather fundamental and even somewhat surprising thesis, taking into account the opinion expressed so far in the practice of the Constitutional Court as well as among legal practitioners on the application of Directive No. 2014/42/EU and the right of a person to effective remedies and

⁵⁵ Judgement of the Constitutional Court of the Republic of Latvia of 19 February 2015 in case No. 2022-01-01. Available: https://www.satv.tiesa.gov.lv/wp-content/uploads/2022/01/2022-01-01_Spriedums_krim.proc._iepazisanas-ar-lietas-materialiem.pdf [last viewed 09.05.2025].

⁵⁶ *Ibid.*, para. 3.

⁵⁷ *Ibid.*, para. 3.

⁵⁸ Judgment of CJEU of 4 October 2024 in case No. C-767/22, C-49/23, C-161/23 *1Dream and others*, para. 80, 89. Available: <https://curia.europa.eu/juris/document/document.jsf?docid=290693&doclang=EN> [last viewed 09.05.2025] See also Judgement of the Constitutional Court of the Republic of Latvia of 19 February 2015 in case No. 2022-01-01. Para.15. Available: https://www.satv.tiesa.gov.lv/wp-content/uploads/2022/01/2022-01-01_Spriedums_krim.proc._iepazisanas-ar-lietas-materialiem.pdf [last viewed 09.05.2025].

a fair trial arising from Article 8 thereof, also in proceedings concerning criminally acquired property. These conclusions of the Court of Justice of the European Union and the Constitutional Court would be worthy of a separate study.

No less worthy of discussion are the conclusions drawn by the Constitutional Court in the present case. In its judgement, the Constitutional Court rightly concluded that, when comparing the scope of the contested norms with the already examined case No. 2016-13-01, the legal regulation had changed in substance. According to the amendments of 6 October 2022, the new regulation grants the parties to the proceedings the right to inspect the materials referred to in the decision initiating proceedings for proceeds of crime, but no longer provides for judicial control over the decision of the authority conducting the proceedings.⁵⁹

The Constitutional Court repeated its assessment of the principle of equality of arms in the context of the first sentence of Article 92 of the Constitution of Latvia, concluding that the fourth and fifth paragraphs of Article 627 of the CPL, in the wording in force from 1 September 2018 to 2 November 2022, provided for the discretion of the authority conducting the proceedings as to the means to ensure protection of the investigative secret in each particular case. But in deciding on the production of material, it did not prevent the authority conducting the proceedings from ensuring that the parties were afforded an equal opportunity and, at the same time, that the secrecy of the investigation was protected. The legislator also provided for the control of the legality of the decision of the authority conducting the proceedings and, consequently, the respect of the fundamental rights of the person connected with the property, ensuring an appropriate balance between the principle of equal opportunities of the parties and the protection of the secrecy of the investigation.⁶⁰

It can be concluded that, in the opinion of the Constitutional Court, already until the amendments of 6 October 2022, the regulation of Article 627(4) and (5) of the CCL complied with the first sentence of Article 92 of the Constitution of Latvia, including ensuring effective procedural guarantees for ensuring the legitimate interests of persons related to property, including the right to have access to the materials contained in the proceedings on criminally acquired property. In general, the conclusions of the Constitutional Court could be agreed with, insofar as in practice no extensive problems with the application of the contested norms have been established. It should be acknowledged here that the competence of the Constitutional Court does not include the control of the application of legal norms and the legality of court decisions⁶¹, which in turn has led to theoretically correct conclusions, but not to the assessment of the problems in practice in the judgment of the Constitutional Court under review.

3.4. Judgment in case No. 2021-44-01

In the same way, in the context of the topicality of proceedings for criminally acquired property, the judgement of the Constitutional Court of 16 April 2025 in case No. 2021-44-01, initiated following several constitutional complaints on the compliance of Section 631(3) of the CCL with the first sentence of Article 92 of

⁵⁹ Judgement of the Constitutional Court of the Republic of Latvia of 19 February 2015 in case No. 2022-01-01, para. 17.2. Available: https://www.satv.tiesa.gov.lv/wp-content/uploads/2022/01/2022-01-01_Spriedums_krim.proc._iepazisanas-ar-lietas-materialiem.pdf [last viewed 09.05.2025].

⁶⁰ *Ibid.*, para. 20.2, 20.4

⁶¹ *Ibid.*, para. 19.4. See also Decision of the Constitutional Court of the Republic of Latvia to Terminate Proceedings in case No. 2017-01-01 of 17 November 2017, para. 11. Available: https://www.satv.tiesa.gov.lv/wp-content/uploads/2017/01/2017-01_01_Lemums_izbeigsana.pdf [last viewed 09.05.2025].

the Constitution of Latvia, was awaited.⁶² The applicants challenged the norm in so far as the proceedings on criminal property are to be heard in two instances and do not provide for a cassation instance in case the regional court adopts a decision on confiscation of property contrary to the decision of the first instance.

In this case, the Constitutional Court concluded that in order for a person related to property to be able to submit evidence on the lawfulness of the origin of property, he must have knowledge of the facts which are the basis for the presumption of the authority conducting the proceedings on the criminal origin of the property. Section 627(4) of the CPL regulates the right of the parties to the proceedings to have access to the materials of the proceedings on criminally acquired property and in the practice of the Constitutional Court it has been previously recognised that Section 627(4) and (5) of the CPL ensured the right of a person related to property to have access to the materials of the proceedings on criminally acquired property to the extent that the respect of his fundamental rights was ensured. On the contrary, whether and to what extent the authority conducting the proceedings in each individual case, in the decision to initiate proceedings for criminally acquired property, in the protest or in the complaint against the decision of the district (city) court, has indicated evidence substantiating his assumption of the criminal origin of the property, is a matter of procedural implementation, and the Constitutional Court does not examine it.⁶³

It can be concluded that the Constitutional Court reiterated what it had already stated that the regulation of Section 627(4) of the CCL, which was in force until the amendments of 6 October 2022, complied with the right of persons to a fair trial enshrined in the first sentence of Article 92 of the Constitution of Latvia, but the problem was related to the issue of application of the legal norms.

3.5. Judgment in case No. 2023-40-01

Finally, mention should also be made of the Constitutional Court's judgment of 24 February 2025 in case No. 2023-40-01, in which it assessed compliance of the words "district (city) court" in Section 629(4) of the CCL with Article 1 and the first sentence of Article 92 of the Constitution of Latvia.⁶⁴ By their constitutional complaint, the applicants challenged the regulation of Section 629(4) of the CCL in so far as it precluded the submission of evidence on the origin of property in the proceedings on criminal property before the regional court.

When assessing the submitted constitutional complaints, the Constitutional Court found that the amendment of 6 October 2022 to Article 629(4) of the CCL provides for limiting the submission of evidence by giving the parties the right to submit evidence in respect of property only before a district (city) court. This is in order to ensure the right to a fair trial, including an effective appeal against a decision on criminal

⁶² Judgement of the Constitutional Court of the Republic of Latvia of 16 April 2025 in case No. 2021-44-01. Available: https://www.satv.tiesa.gov.lv/wp-content/uploads/2021/12/2021-44-01_parsudziba-procesa-par-NIM-1.pdf [last viewed 09.05.2025].

⁶³ Ibid., para. 18.1.2. See also: Judgement of the Constitutional Court of the Republic of Latvia of 19 February 2015 in case No. 2022-01-01, para. 20.4. Available: https://www.satv.tiesa.gov.lv/wp-content/uploads/2022/01/2022-01-01_Spriedums_krim.proc._iepagisanas-ar-lietas-materialiem.pdf [last viewed 09.05.2025].

⁶⁴ Judgement of the Constitutional Court of the Republic of Latvia of 24 February 2025 in case No. 2023-40-01. Available: https://www.satv.tiesa.gov.lv/wp-content/uploads/2023/11/2023-40-01_Spriedums_krim.proc._pieradijumu_iesn_.pdf [last viewed 09.05.2025].

property.⁶⁵ Having assessed the problems identified in practice, on 22 October 2024 amendments to Section 631(5) of the CPL entered into force, granting the regional court the competence to annul the decision of the district (city) court and to refer the case for a new hearing if a party to the proceedings has submitted evidence which for objective reasons could not be submitted to the district (city) court earlier.⁶⁶

It is significant that in the framework of this judgment the Constitutional Court returned to the scope of Article 92 of the Constitution of Latvia, as assessed above, in relation to ensuring the principle of equal opportunities of the parties. The Constitutional Court reiterated that the principle of equal opportunities of the parties in proceedings concerning criminal property, on the one hand, provides all parties to the proceedings with an opportunity to present the facts of the case and, on the other hand, prevents any party from being granted a substantial advantage.⁶⁷ Referring to the case law of the ECtHR, the Constitutional Court concluded that the State may impose restrictions on the submission of evidence in court, but they must be proportionate and justified in order to prevent abuse of procedural rights and to preserve the effectiveness of the proceedings.⁶⁸ However, it is not entirely excluded that there may be objectively possible situations in which a person related to property may obtain evidence only after the case has already been heard by a district (city) court and, in such circumstances, the principle of equal opportunities of the parties was not ensured by preventing the person from submitting evidence at the appellate instance.⁶⁹

What are the implications of these findings for this study? Although in the framework of this case the Constitutional Court did not assess the right to information of the persons involved in the proceedings, it can be concluded from the judgment that there may be situations in which, even if the materials of the proceedings for criminally acquired property are presented and available, the persons related to the property need to submit additional evidence in order to refute the presumption that the property is of criminal origin. The principle of equal opportunity, including the right to submit evidence and to know what allegations of the criminal origin of the property are to be defended against, must be ensured to all persons involved in the proceedings in order for such proceedings to comply with the right to a fair trial guaranteed by the first sentence of Article 92 of the Constitution. In any fair trial, not only is the investigating authority entitled to gather evidence, but the parties to the proceedings must also have an equal right at all times to present evidence to challenge the presumption of the criminal origin of the property.

⁶⁵ Ibid. See also: Explanatory Note to the Draft Law “Amendments to the Criminal Procedure Law” (Reg. No. 1323/Lp13). Available: <https://titania.saeima.lv/LIVS13/SaeimaLIVS13.nsf/0/1493B4CCD CBD851EC22587DB0029DF4D?OpenDocument> [last viewed 09.05.2025].

⁶⁶ Judgement of the Constitutional Court of the Republic of Latvia of 24 February 2025 in case No. 2023-40-01, para. 10.2, 11. Available: https://www.satv.tiesa.gov.lv/wp-content/uploads/2023/11/2023-40-01_Spriedums_krim.proc._pieradijumu_iesn_.pdf [last viewed 09.05.2025].

⁶⁷ Ibid., para.12.

⁶⁸ Ibid., para. 12. See also: Judgement of 16 February 2020 of the European Court of Human Rights in case *Fitt v. the United Kingdom*, No. 29777/96, para. 45. Available: <https://hudoc.echr.coe.int/eng?i=001-58833> [last viewed 09.05.2025].

⁶⁹ Judgement of the Constitutional Court of the Republic of Latvia of 24 February 2025 in case No. 2023-40-01, para. 13. Available: https://www.satv.tiesa.gov.lv/wp-content/uploads/2023/11/2023-40-01_Spriedums_krim.proc._pieradijumu_iesn_.pdf [last viewed 09.05.2025].

4. Limits of the presumption of innocence

It should be noted that, in some instances, attempts are made to invoke the guarantees of the presumption of innocence – enshrined in Article 6(2) of the European Convention on Human Rights the second sentence of Article 92 of the Constitution of the Republic of Latvia, and Section 19 of the CPL – in proceedings concerning criminally acquired property. However, such application is unfounded. In its judgment of 14 March 2025 in case No. 2022-32-01, the Constitutional Court provided a detailed explanation, stating that the principle of the presumption of innocence in the context of ordinary criminal proceedings protects individuals by ensuring that findings made in proceedings on criminally acquired property cannot be used to determine their guilt in committing a criminal offence. However, the presumption of innocence does not apply to a person connected with the property in proceedings concerning criminally acquired assets, where the issue is limited to the criminal origin of the property, assessed from a civil-law perspective. Accordingly, as proceedings concerning criminally acquired property constitute *in rem* proceedings and only address the criminal origin of the property from a civil-law perspective, the contested regulation does not fall within the scope of the second sentence of Article 92 of the Constitution of the Republic of Latvia.⁷⁰

The ECtHR has similarly emphasised that Article 6(2) of the Convention protects the right of an accused to be presumed innocent in criminal proceedings. Property confiscation carried out in proceedings *in rem*, where the person is not accused, does not have a punitive nature and thus does not trigger the application of the presumption of innocence.⁷¹ Nevertheless, the presumption of innocence does not preclude a court in another type of proceeding – one with a different function than criminal prosecution – from considering the same factual circumstances that are being assessed in parallel criminal proceedings, provided that such consideration does not entail a determination of criminal liability.⁷² The ECtHR does not apply the presumption of innocence to forms of confiscation without conviction because these are considered non-criminal measures: the European Court does not this safeguard pursuant to Article 6(2) but only the principle of due process pursuant to Article 6(1).⁷³

Summarising the practice of the Constitutional Court in the last decade in the field of the right to information, it must be concluded that the regulation of Articles 627 and 629 of the CCL has been assessed on several occasions, drawing significant

⁷⁰ Judgement of the Constitutional Court of the Republic of Latvia of 14 March 2025 in case No. 2022-32-01, para. 15. Available: https://www.satv.tiesa.gov.lv/web/viewer.html?file=https://www.satv.tiesa.gov.lv/wp-content/uploads/2022/08/2022-32-01_spriedums.pdf#search=Kriminalprocesa [last viewed 28.07.2025].

⁷¹ See also Judgement of 12 May 2015 of the European Court of Human Rights in case *Gogitidze and Others v. Georgia*, No. 36862/05, para. 126. Available: <https://hudoc.echr.coe.int/eng?i=001-154398> [last viewed 09.05.2025].

⁷² Judgement of the Constitutional Court of the Republic of Latvia of 14 March 2025 in case No. 2022-32-01, para. 15. Available: https://www.satv.tiesa.gov.lv/web/viewer.html?file=https://www.satv.tiesa.gov.lv/wp-content/uploads/2022/08/2022-32-01_spriedums.pdf#search=Kriminalprocesa [last viewed 28.07.2025]. See also Judgement of 11 June 2024 of the European Court of Human Rights in case *Nealon and Hallam v. the United Kingdom*, No. 32483/19 and 35049/19, para. 169. Available: <https://hudoc.echr.coe.int/eng?i=001-234468> [last viewed 28.07.2025].

⁷³ *Maugeri, A. M.* Regulation (EU) 2018/1805: Mutual recognition of freezing and confiscation orders between efficiency and safeguards. “Proceedings in criminal matters” and non-conviction based confiscation. *New Journal of European Criminal Law*, 15(2), 2024, p. 186. Available: <https://doi.org/10.1177/20322844241239781> [last viewed 28.07.2025].

conclusions on the compliance of legal norms with the first sentence of Article 92 of the Constitution of Latvia. The legislator has taken into account the findings of the Constitutional Court on the right of persons related to property to access the case file in the proceedings on criminally acquired property.

This prompts a fundamental question: if the scope of Section 627(4) of the CPL was already sufficiently clear and compliant with Article 92(1) of the Constitution of Latvia before the latest amendments, why did the legislator need to initiate amendments and allow the persons involved in the proceedings the right to access the case file in the proceedings for criminal property without discussions with the initiators of the proceedings and the court of appeal? Whatever the answer, in any event, it must be concluded that with the recent amendments to Article 627(4) of the CPL, the legislator has included a procedural order which comprehensively ensures the right to information and effective remedies of the persons involved in the proceedings, also in proceedings under Chapter 59 of the CPL on proceeds of crime. The road to the introduction of such a regulation has been long and arduous, but the grammatical scope of the provision, at least for the time being, ensures clear respect for the right of persons to a fair trial. The only question that remains is whether the problem has really been solved in practice or “merely on paper”.

5. Issues in legal practice following the entry into force of the amendments to Section 627, paragraph 4 of the Criminal Procedure Law on 6 October 2022

Considering the development of the regulatory framework and the case law of the Constitutional Court, it follows that when deciding on the criminal origin of property and its potential confiscation in accordance with Chapter 59 of the Criminal Procedure Law (CPL), the person whose property interests may be affected is, under the current wording of Section 627(4) of the CPL, informed of both the position of the authority conducting the proceedings regarding the facts and evidence substantiating the criminal origin of the property, and is granted access to the evidence collected to support such a position. In other words, the range of information made available to the person concerned is considered sufficient to enable them to protect their interests, submit evidence attesting to the lawful origin of the property (if any), and substantiate their legal position and propriety rights.

However, it is necessary to note that despite the legislative amendments and the Constitutional Court's findings, there may still be cases where the decision to initiate proceedings regarding criminally acquired property lacks sufficient information for the person concerned to effectively and fully exercise their right of defence and fulfil the burden of proof regarding the lawful origin of the property.

Similar challenges have been identified in the context of corporate criminal liability. As noted in other studies on corporate prosecution in Latvia, the legal regulation on corporate prosecutions, although introduced in Latvia more than 15 years ago and amended several times, still cannot be considered as sufficiently clear or precise, and creates grounds for proposing changes to it. A large part of procedurally important issues does not appear in the final court rulings or procedurally complex cases do not even reach courts.⁷⁴ These observations reveal

⁷⁴ *Strada-Rozenberga, K., Meikališa, Ā.* Corporate Prosecutions – on Some Relevant Issues Related to the Criminal Procedural Status of Legal Entities. *Journal of the University of Latvia. Law*, 15, 2022, p. 30. <https://doi.org/10.22364/jull.15.02>

a broader issue in Latvian criminal procedure: that legally significant procedural deficiencies may remain hidden from judicial scrutiny, either because of investigative discretion or because they are filtered out before the case reaches court. This concern directly parallels the problems of inadequate access to information identified in confiscation proceedings, as discussed below.

First, a brief word on a seemingly technical issue, which, however, also concerns the right to a fair trial. Namely, a lack of consensus persists in practice on the right of a person to copy the case file. In his doctoral thesis⁷⁵, J. Stukāns, Prosecutor General of the Republic of Latvia, acknowledged that the parties to a case should have the possibility to access the materials mentioned in the decision on initiating proceedings for proceeds of crime, but that copying or reproduction of the materials in any form should not be allowed. However, no specific reasoning is given for this. The prohibition to receive or make copies of the case file can often put a person at a significant disadvantage compared to an investigator or prosecutor who can freely consult the case file at any time and refer to specific pages. In this respect, it would be worth noting the ECtHR's conclusions⁷⁶ on the need to provide copies, as a fair trial must create conditions in which a person has a reasonable opportunity to present his or her case and is not placed at a disadvantage compared to the other side. It follows from Article 627(4) of the CPL that the person directing the proceedings and the public prosecutor are free to consult the case file, i.e., they have access to all the material throughout the proceedings and may refer to specific pages and document titles. The person connected with the property, on the other hand, has only the possibility to read the material and to make notes by hand. The property-related person is therefore in a worse position than the investigator and the prosecutor.⁷⁷

The next issue concerns the question whether the existing framework provides sufficient clarity regarding the nature of the allegations against the property, enabling the owner to effectively defend his or her property interests. From the perspective of the property owner, fulfilling the burden of proof regarding the property's origin may present a particularly complex challenge if they are not adequately informed about the considerations leading the authority to regard the property in question as criminally acquired. In straightforward cases, complications are unlikely. However, in the case of entrepreneurs with long-standing business activities, purchasing goods over many years from dozens or hundreds of suppliers and selling them to clients worldwide, the general obligation to prove the lawful origin of funds becomes significantly more difficult.

What does such a general requirement to prove the lawful origin of seized funds even mean in this context? How can one determine which particular transactions

⁷⁵ *Stukāns, J.* Mantas atzišana par noziedzīgi iegūtu tiesiskais regulējums un tā piemērošanas problemātika [Legal regulation of the recognition of property as criminally acquired and problems with its application]. Doctoral thesis, p. 87. Available: https://www.rsu.lv/sites/default/files/dissertations/Stukans_promocijas_darbs_LV.pdf [last viewed 09.05.2025].

⁷⁶ See, for example: Judgement of 17 July 2007 of the European Court of Human Rights in case *Bobek v. Poland*, No. 68761/01, para. 59, 62, 63. Available: <https://hudoc.echr.coe.int/eng?i=001-81677>, Judgement of 24 April 2007 of the European Court of Human Rights in case *Matyjek v. Poland*, No. 38184/03, para. 59. Available: <https://hudoc.echr.coe.int/eng?i=001-80219>, Judgement of 18 March 1997 of the European Court of Human Rights in case *Foucher v. France*, No. 22209/93, para. 36. Available <https://hudoc.echr.coe.int/eng?i=001-58017> [last viewed 09.05.2025].

⁷⁷ *Kūtris, G.* Mantas atzišana, p. 94.

have resulted in the funds seized from a business account that has operated for years? Therefore, in such cases, the decision to initiate proceedings concerning criminally acquired property must provide sufficient specific reasoning for the presumption of criminal origin. This would enable the recipient to understand which transactions, with which parties, during which time period, are suspected of being linked to criminal activity, and to grasp the legal nature of those suspicions, i.e., the type of offence suspected. Only with such detailed information will the property owner be able to effectively defend their property rights and fulfil their procedural obligation to prove the lawful origin of the property and the absence of any criminal conduct in its acquisition.

So far, this concerns the process under Chapter 59 of the CPL. Meanwhile, what is the situation regarding the availability of information to the person concerned in cases where, pursuant to Section 356(2)(2) of the CPL, during the pre-trial investigation, the authority recognises property as criminally acquired by decision, specifically when the property is found or seized from the suspect, accused, or a third party, who had previously reported its loss and proved ownership upon recovery?

Here, the situation is more problematic. The CPL contains no specific regulation on the information to be provided to a person in whose respect such a decision is made. Accordingly, the general provisions of Chapter 19 of the CPL apply. The decision must include a summary of the facts established during the investigation that form the basis of the decision and a reasoning section referencing the applicable legal norms and substantiating the conclusion. The person will only receive the decision recognising the property as criminally acquired after its adoption, and may appeal it under the procedure laid down in Chapter 24 of the CPL. Furthermore, during the pre-trial investigation, the person concerned is not entitled to access the case materials on which the decision is based, as such materials are considered investigative secrets and disclosure is at the discretion of the authority, since there is no explicit legal obligation to do so.

Therefore, in these instances, the CPL fails to ensure that the person concerned is adequately informed in a timely manner of the grounds for recognising the property as criminally acquired or has access to the relevant evidence. The person's defence options are thus limited to the information included in the decision itself, and appeals can only be made based on the content of that document. While this level of information might be adequate in some cases, such as straightforward offences like theft, fraud, or embezzlement, where the person concerned is already a suspect or accused and the criminal origin of the property is inherently clear, the situation becomes particularly challenging when the property is found with a third party holding the status of an affected person. Such individuals may have no detailed information about the suspicions regarding the property's origin. Hence, their rights may be jeopardised due to a lack of sufficient factual detail underpinning the property seizure.

The final aspect to be analysed concerns the protection of the right to information in criminal proceedings where a final ruling addresses criminally acquired property. First, in proceedings adjudicated in the ordinary procedure, a person with a right of defence whose property has been seized must be informed whether the prosecution will raise any allegations regarding criminally acquired property in that criminal case. This information is essential for the accused to understand the scope of proof required and to defend their interests in a fair trial. The court also needs this information in the evidentiary stage to identify the issues to be proved.

Such information is often missing from the decisions committing the case to court. This can be attributed to the current wording of Section 413 of the CPL, which regulates the content of such decisions and does not explicitly require the prosecutor to address the issue of criminally acquired property. Sometimes, references to such property can be inferred from the description of the alleged offence in the decision. If the person is accused of a specific offence involving unlawful acquisition of property, then it is obvious which property might be regarded as criminally acquired. However, this is not always the case.

An increasing number of proceedings concern the stand-alone laundering of criminal proceeds, without identifying a predicate offence. Additionally, Section 70.11 of the Criminal Law provides for the confiscation of indirectly acquired or presumed criminally acquired property, while Section 70.14 provides for the confiscation of substitute property. In such cases, it is not always clear from the decision committing the case to court whether the prosecutor intends to ask the court to confiscate such property, as this may not be apparent from the offence description.

Although there may be decisions to seize property containing reasons for the seizure, these are not the procedural documents from which the court or the person concerned can ascertain whether the prosecutor intends to seek confiscation and on what grounds. Section 413 of the CPL does not require the prosecutor to identify criminally acquired property or explain the basis for such claims. While a literal interpretation may not support a duty to provide such information, this narrow approach does not ensure the protection of the lawful interests of the parties and therefore ought not be applied.

It is essential to point out that Section 514 of the CPL, which governs the issues to be decided in the deliberation of the court, explicitly states that the court must determine the issue of confiscation of criminally acquired property. Section 528 of the CPL further requires the court to indicate in the operative part of the judgment its decision on such confiscation.

Accordingly, if the confiscation of criminally acquired property is an issue to be decided in court deliberations, the factual circumstances relevant to that issue are part of the subject of proof under Section 124(2) of the CPL. Since proving means substantiating allegations with evidence, all parties must be aware from the start of the trial which facts are to be established. Otherwise, they will be unable to participate effectively in the evidentiary process and debates.

Therefore, Section 413 of the CPL should be regarded as an incomplete provision, lacking a requirement for the prosecutor to include information about criminally acquired property. This is supported by other provisions of the CPL, where such a duty is expressly stipulated:

- Section 438(2)(4.2) requires the inclusion of information on criminally acquired property and its proposed handling in cases referred to court under a plea agreement;
- Section 627(2) requires that decisions to initiate proceedings regarding criminally acquired property must include information on the facts and evidence substantiating its criminal origin, the persons associated with the property, and the proposed action concerning the property.

In light of the above, the question of whether property belonging to a party is criminally acquired and how it should be handled is undoubtedly a matter for the court to consider if raised by the prosecution. Therefore, both the court and the persons with the right of defence, as well as other participants, must be informed

of such claims before the evidentiary stage begins. If this issue is to be adjudicated, it becomes part of the subject of proof, and the parties must be able to present their views accordingly.

The extent of information required from the prosecution regarding criminally acquired property should match the information provided to participants in special proceedings under Chapter 59 of the CPL. There is no legal or logical justification for limiting the scope of such information in a full trial.

This publication will not address the treatment of this issue in other types of final decisions, such as judgments under plea agreements, prosecutorial penalty orders, or conditional waivers of prosecution. However, all these decisions require the consent of the person with the right of defence. Therefore, such persons must be fully informed of the property-related consequences before giving consent. The situation is more complex for affected property owners, whose consent is not required, and this deserves separate analysis in future research.

Summary

Although the regulation set out in Chapter 59 of the Criminal Procedure Law (CPL) differs from the main criminal proceedings and concerns decisions affecting the property rights of persons connected to the property, the guarantees of the right to a fair trial as derived from the first sentence of Article 92 of the Constitution are fully applicable. The legal framework governing proceedings concerning criminally acquired property has evolved since the adoption of the CPL, particularly over the last decade. Several rulings by the Constitutional Court have influenced this development, assessing the compatibility of the regulation with the right to a fair trial. Although a stable practice has emerged, questions remain regarding the application of Chapter 59 of the CPL, especially insofar as it concerns the rights of parties to access case materials in proceedings involving criminally acquired property. Whether the most recent legislative amendments will resolve these issues in practice or only on paper, and whether authorities conducting the proceedings will effectively guarantee comprehensive access to case materials, is yet to be determined.

Regarding proceedings under Chapter 59 of the CPL, the amount of information available to participants is, at the normative level, sufficient to ensure a fair trial and enable the parties involved to effectively protect their proprietary interests. Nevertheless, in practice, it may at times be advisable for the authority initiating the proceedings to provide a more detailed explanation in the decision regarding the basis for asserting that the property is of criminal origin. This would allow the property owner to more accurately identify the specific facts on which the authority's claim is based.

With regard to the procedure under Section 356(2)(2) of the CPL, which allows the authority to recognise property as criminally acquired by decision during the pre-trial investigation, it should be noted that both the procedure for adopting such decisions and the existence of investigative secrecy currently prevent the person concerned from receiving sufficient information on the factual circumstances and evidence underlying such a decision. Therefore, it would be worth considering either removing this possibility from the law altogether, or amending the legal framework to provide the person concerned with a level of access to information equivalent to that granted under Chapter 59 of the CPL.

In relation to criminal proceedings adjudicated in the ordinary course before a court, it would be advisable to amend Section 413 of the CPL, which governs the content of the decision to refer a criminal case to court, by introducing a requirement for prosecutors to include information concerning potentially criminally acquired property to the same extent as currently required under Section 627(2) of the CPL for proceedings conducted under Chapter 59. Without such obligation, interpretative inconsistencies across institutions may persist.

In conclusion, the analysis confirms that the right to access information in criminal proceedings – as protected under Latvian constitutional law and the European Convention on Human Rights – is subject to nuanced interpretation and evolving application. The paper has demonstrated that both the Constitutional Court of Latvia and the ECtHR recognize this right as fundamental, yet context-dependent, thus requiring a careful balance between procedural fairness and public or investigative interests.

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<https://doi.org/10.22364/jull.19.11>

Importance of *Ultima Ratio* Principle in Criminal Law

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Before making a decision on criminalizing a deed, which entails more serious negative consequences for a person than other violations, the increased harmfulness of the deed in question must be considered. However, criminal liability, due to its intractable repressive impact and cost capacity, is justifiable only if the *ultima ratio* principle is observed, namely, if the undesirable deed cannot be prevented by alternative means with equal efficiency. The article explains the origin, content, and significance of the *ultima ratio* principle in the modern criminal law system, which limits the legislator's powers to criminalize. Although the role of the legislator's political considerations in both determining the harmfulness of the deed and choosing measures to combat it cannot be eliminated, the *ultima ratio* principle as a specific criminal law related element of the principle of proportionality, universally recognized as a general principle of law, must be observed in formulating the *corpus delicti* in the Criminal Law, taking into account that the application of any criminal punishment is a restriction of human rights.

Keywords: *ultima ratio*, proportionality, criminalization, general principles of law.

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Introduction

The legal system and, accordingly, the areas of law that form it must be systemically structured towards a certain goal, which in an independent democratic state is justice,

to function normally.¹ This is ensured not only by written legal norms, which are inevitably imperfect, primarily because it is typical for the legislator as a group of people to make mistakes,² but also by principles of law that directly or indirectly influence the formation of legal relations. They include both legal thought and practice guidelines, which determine the rules of conduct in a certain area to a greater or lesser degree of abstraction, as well as general principles of law, which, like written legal norms, have general binding force and are mandatory not only for the applicant of the legal norm and its addressee, but also for the legislator, fixing the legal norms in legal acts.

The criminal law is not an exception. The principles organizing criminal proceedings are positivized in Chapter 2 “Principles of Criminal Procedure” of the Criminal Procedure Law³. Even if the highest constitutional rank of all these principles is not theoretically proven yet, they determine the procedure of criminal proceedings chosen by the legislator, and the implementation of the ideas contained in them in practice is ensured by the fixation of these principles in written legal norms, which in turn provides an opportunity to systematically interpret other legal norms in accordance with them.⁴ In turn, principles of substantive criminal law are not *expressis verbis* disclosed in the regulatory enactments of Latvia, but they are defined in the theory of criminal law.

Latvian and foreign authors primarily mention the principle of legality (*nullum crimen sine lege*), the principle of guilt (*nulla poena sine culpa*), and the principle of individualization of criminal liability as specific principles of criminal law.⁵

Not all of these principles are stable, for example, the requirements for clarity of legal norms derived from the principle of legality are increasingly being relaxed.⁶ The boundaries of the principle of guilt have also become looser, as, for pragmatic

¹ Rezevska, D. Labas likumdošanas princips un likumdevēja rīcības brīvība [Principle of Good Legislation and the Legislator's Discretion]. *Jurista Vārds*, 22, 28.05.2024, p. 10.

² See: Rezevska, D. *Vispārējo tiesību principu nozīme un piemērošana*. 2. izdevums [Meaning and Application of General Principles of Law. 2nd ed.]. Rīga: Daiga Rezevska, 2015, pp. 45–46.

³ Kriminālprocesa likums [Criminal Procedure Law] (21.04.2005). Available: <https://likumi.lv/ta/id/107820-kriminalprocesa-likums> [last viewed 10.03.2025].

⁴ Latvian researchers have not yet problematized this aspect in the legal literature devoted to criminal proceeding, but Ārija Meikališa once stated that the principles of criminal proceeding are legal, as they are directly expressed in law as general leading norms. The author adds, however, that there is no legal significance whether they are reflected in the constitution or not, taking into account that they always act as norms with general and leading significance regardless of the form of legislative confirmation. Therefore, they all according to the author have constitutional significance (*Meikališa, A. Kriminālprocesa tiesības. Vispārīgā daļa*. 1. grāmata [Criminal procedure law. General part. 1st book]. Rīga: RaKA, 2000, pp. 150, 156).

⁵ See: *Jareborg, N. Criminalization as Last Resort (Ultima Ratio)*. *Ohio State Journal of Criminal Law*, 2, 2005, p. 522; *Fedosiukas, O. Baudžiamoji atsakomybė kaip kraštutinė priemonė (ultima ratio): teorija ir realybė* [Criminal Liability as a Last Resort (Ultima Ratio): Theory and Reality]. *Jurisprudencija*, 19(2), 2012, p. 716; *Dambrauskienė, A. Ultima ratio principo samprata* [Concept of the Principle of ultima Ratio]. *Teisė*, 97, 2015, p. 129; *Liholaja, V. Krimināltiesības*. *Latvijas Nacionālā enciklopēdija* [Criminal Law. National Encyclopedia]. 25.01.2024. Available: <https://enciklopedija.lv/skirklis/2467-krimin%C4%81ties%C4%ABbas> [last viewed 04.03.2025].

⁶ See: Judgement of the Constitutional Court of the Republic of Latvia of 21 February 2019 in case No. 2018-10-0103 (*Latvijas Vēstnesis*, No. 40, 26.02.2019,) and Separate opinion of Ineta Ziemele and Sanita Osipova of 6 March 2019 (*Latvijas Vēstnesis*, No. 79, 18.04.2019), where the person's ability to foresee the risk of punishment for illegal behaviour with an object incompletely described in the disposition of the legal norm has been assessed.

reasons, strict liability has been introduced for criminal offences.⁷ This also refers to the criminal law thought subsisting in Latvia, where recent findings in criminal law theory point to the declarative nature of this principle, for example, Uldis Krastiņš has clearly acknowledged that in those *corpus delicti* that are recognized as completed without establishment of any negative consequences, guilt as a basic element of the men's *rea* is presumed, arguing that the principle of strict liability⁸ is incorporated in the second part of Section 9 of the Criminal Law⁹ (hereinafter – the Criminal Law).

The aforementioned principles are related to the application of already effective norms, but the development and adoption of criminal law norms are influenced by the principle of *ultima ratio*. According to it, criminal law can be used only as the last resort for the adequate, i.e., effective, suppression of a harmful deed and, accordingly, for the maintenance of legal order, taking into account the repressive nature of criminal law, which can have profound and irreversible socio-economic consequences, and the costs of this type of process, which are borne by society from common funds.¹⁰

The use of criminal law only in cases of extreme necessity is generally recognized in foreign legal literature.¹¹ In the Latvian criminal law theory the *ultima ratio* principle *expressis verbis* has so far received little attention. Its content has been revealed episodically only in connection with the efficiency of the criminal proceedings, seeing in sufficiently unjustified criminalisation the cause of additional load on the criminal proceedings.¹² At the same time, the expression of this principle, without naming it, has also been recognized in passing in the works of domestic authoritative pre-war¹³

⁷ Jareborg, N. Criminalization as Last Resort (Ultima Ratio). *Ohio State Journal of Criminal Law*, Vol. 2, 2005, p. 522.

⁸ Krastiņš, U. Noziedzīga nodarījuma sastāvs un nodarījuma kvalifikācija [Constituent Elements of a Criminal Offence and Qualification of an Offence]. Rīga: Tiesu namu aģentūra, 2014, pp. 142–143; Krastiņš, U. Prettiesiska nodarījuma kaitīgo seku divējādā nozīme [The dual meaning of the harmful consequences of an unlawful act]. *Jurista Vārds*, No. 33, 25.08.2015, p. 15; Krastiņš, U., Liholaja, V. Krimināllikuma komentāri. Pirmā daļa (I–VIII² nodaļa). 3. izdevums [Comments on the Criminal Law. Part One (Chapters I–VIII²). 3rd ed.]. Rīga: Tiesu namu aģentūra, 2021, pp. 64–64.

⁹ Krimināllikums [Criminal Law] (17.06.1998). Available: <https://likumi.lv/ta/id/88966-kriminallikums> [last viewed 10.03.2025].

¹⁰ See: Keiler, J., Roef, D. Principles of Criminalisation and the Limits of Criminal Law. In: *Comparative Concepts of Criminal Law*. 3rd ed. Keiler, J., Roef, D. (eds.). Cambridge: Intersentia, 2019, pp. 77–79; Van Kempen, P. H. Criminal Justice and the *Ultima Ratio* Principle: Need for Limitation, Exploration and Consideration. In: *Overuse in the Criminal Justice System: On Criminalization, Prosecution, and Imprisonment*. Van Kempen, P. H., Jendly M. (eds.). Cambridge: Intersentia, 2019, pp. 5–6; Nicoricì, C. The Principle of Legality and General Crimes – the Particular Case of Abuse in Service of Public Officer. In: *Revisiting the Limits of Freedom While Living Under Threat*. II. 9–10 November 2023, Riga. Collection of research papers in conjunction with the 9th International Scientific Conference of the Faculty of Law of the University of Latvia. Riga: University of Latvia Press, 2024, p. 91.

¹¹ Ashworth, A. *Principles of Criminal Law*. 5th ed. Oxford: Oxford University Press, 2006, p. 31; Husak, D. *Criminal Law Theory*. In: *The Blackwell Guide to the Philosophy of Law and Legal Theory*. Golding, M. P., Edmundson, W. A. (eds.). Oxford: Blackwell Publishing, 2006, pp. 116; Keiler, J., Roef, D. *Principles of Criminalisation*, pp. 76–79; Fedosiukas, O. Baudžiamoji atsakomybė kaip kraštutinė priemonė (*ultima ratio*), pp. 716–717.

¹² Kriminālprocesa obligātums un lietderīgums kā kriminālās justīcijas sistēmas pamatprincipi [Legality and Opportunity of Criminal Proceedings as the Fundamental Principle of Criminal Justice System]. *Strada-Rozenberga, K., Meikalīša, Ā.* (eds.). Rīga: Latvijas Universitātes Akadēmiskais apgāds, 2023.

¹³ Mincs, P. Krimināltiesību kurss. Vispārējā daļa. Ar U. Krastiņa komentāriem [Criminal law course. General part. With comments by U. Krastiņš]. Rīga: Tiesu namu aģentūra, 2005, pp. 17, 18; Lejiņš, P. Krimināltiesības [Criminal Law]. [S. l.]: [s. n.], 1940, pp. 9–10.

and modern criminal law¹⁴ researchers and professors whose ideas are included throughout the article. But these authors have not paid special attention to this topic, so it is difficult to make a detailed comparison with the in-depth studies conducted by foreign authors.

The purpose of this article is to draw attention to the vital importance of the *ultima ratio* principle in order to ensure constitutionality of the criminalisation and to promote its application in practice.

1. Origin of *ultima ratio* principle

The *ultima ratio* principle has its origins in the context of the philosophical thought of the Age of Enlightenment, when the principles of modern criminal law have emerged, which limit the state's power to use criminal law for the purpose of influencing society.¹⁵ Thus, the understanding of the relationship between man and the state changed significantly. At this time, which was characterized by critical thinking and the ability to rationally solve any problems,¹⁶ it was understood that the application of criminal punishment requires a convincing justification.¹⁷ Coevally, the doctrine of natural law, which is the basis of the legal system of a modern democratic state, developed. One of its axioms is the recognition of the difference between written legal norms and independent of them, inalienable rights of the person.¹⁸ Accordingly, the question whether anything for which criminal liability is provided in the criminal law, while formulating the *corpus delicti* in the form of legal norms, also corresponds to the rights that do not depend on the will of the legislator arises in the context of the matters of this article.

In this regard, modern criminal law is paradoxical, as on the one part it has long been unacceptable to adopt laws that are not rooted in the support of the sovereign, on the other part criminal legislation has become very active,¹⁹ and not only, or even primarily for the purpose of mitigating liability.

¹⁴ *Reigase, A.* Kriminalizācija un dekriminalizācija – krimināltiesību politikas īstenošanas metodes [Criminalization and decriminalization – methods of implementing criminal justice policy]. Administratīvā un Kriminālā Justīcija, No. 2, 2007, p. 13; *Krastiņš, U.* Krimināllikuma izstrāde un attīstība gadu gaitā: caur atmiņu prizmu [The Development and Evolution of Criminal Law over the Years: through the Prism of Memory]. Jurista Vārds, No. 15, 09.04.2024, p. 18; *Krastiņš, U.* Ieskats Krimināllikuma vispārīgās daļas attīstības procesā [Insight into the Development Process of the General Part of the Criminal Law]. Jurista Vārds, 35, 29.08.2023, p. 14.

¹⁵ *García de la Torre García, F.* Crises of the *Ultima Ratio* Principle: Shall We Resume the Constitutional Criminal Law Guidance? In: Crisis of the Criminal Law in the Democratic Constitutional State. Manifestations and Trends. *Crespo, E. D., García Figueroa, A., Córdoba G. M.* (eds.). Switzerland: Springer Cham, 2023, pp. 39–40, 42. He refers to the works of Montesquieu, Cesare Beccaria and Jeremy Bentham as the first who set the boundaries of criminal law.

¹⁶ *Robinson, O. F., Fergus, T. D., Gordon, W. M.* European Legal History. Sources and Institutions. 3rd ed. Oxford: Oxford University Press, 2000, p. 249.

¹⁷ *Claessen, J.* Theories of Punishment. In: *Keiler J., Roef, D.* (eds.). Comparative Concepts of Criminal Law. 3rd ed. Cambridge: Intersentia, 2019, pp. 16–17.

¹⁸ See: *Rezevska, D.* General Principles of Law as Common Constitutional Traditions of the European Union Member States. Journal of the University of Latvia. Law, 15, 2022, p. 156.

¹⁹ The thematic issue of the weekly journal “Jurista Vārds” dedicated to the 25th anniversary of the Criminal Law was published under the title “A law that is always open in society and in the *Saeima* [the Parliament of the Republic of Latvia]” (09.04.2024, No. 15).

Given that contemporary constitutionalism is characterised by human being as the main subject, on whose rights the state should focus,²⁰ the state can no longer be considered a usurper. Moreover, the primary responsibility for guaranteeing human rights and preventing or eliminating any violations lies with the state.²¹ In a protective manner fulfilling the insistent demand of society for protection from the ever-increasing risks to its security,²² the state constantly revises the criminal law, formulating ever new criminal offences and increasing penalties. There is no doubt, the state has to use criminal law to fulfil the positive obligations of the state arising from the constitution to ensure the effectiveness of the fundamental rights enshrined therein, but the negative obligation of the state not to interfere with the enjoyment of the fundamental rights of another person, which unjustified criminalisation may violate, has not been invalidated either.²³ Therefore, the *ultima ratio* principle is the intersection of these two state obligations, where the decision must be made on the permissibility of criminalisation.

Translated from Latin, *ultima ratio* means “last” (*ultima*) and “reason” (*ratio*).²⁴ Thus, it is the ultimate measure influencing the person that exists in society and is available to state power, with which the goal can be achieved. Moreover, it is not chronologically the last, but the most burdensome measure with the most far-reaching negative consequences for the person, as historically the title of the principle originates from the phrase *ultima ratio regum*, which denoted the king’s last word in resolving a political conflict, and not the last measure to achieve the set goal after all other options for influencing the opponent have been used.²⁵ In other words, the *ultima ratio* principle means the all other options must be considered instead of criminalisation, but they do not all need to be actually tested in practice sequentially.²⁶

2. Content of *ultima ratio* principle

2.1. Evaluation of alternative measures of criminal liability

Taking into account the costs of criminal proceedings in their broadest sense, which include not only the costs of the state budget, but also the time spent by the participants of the proceedings, and the fact that state resources are still insufficient to finance the growing needs of society, criminal liability is still provided

²⁰ Rodiņa, A., Kārklīņa, A. 25 Years of Fundamental Rights in the Constitution of the Republic of Latvia: Development, Significance and Content. *Journal of the University of Latvia. Law*, 16, 2023, p. 21.

²¹ Di Capua, V. The Protection of Fundamental Rights by the Constitutional Court in the Republic of Latvia. Perspectives, Opportunities and Limits of an Introduction of the Model in Italy. *Journal of the University of Latvia. Law*, 16, 2023, p. 195.

²² Roef, D., Keiler, J. Introduction. In: Keiler J., Roef, D. (eds.). *Comparative Concepts of Criminal Law*. 3rd ed. Cambridge: Intersentia, 2019, p. 30; Ashworth, A. *Principles of Criminal Law*, p. 65.

²³ See more: García de la Torre García, F. Crises of the Ultima Ratio Principle, pp. 50–52.

²⁴ Wendt, R. The Principle of “Ultima Ratio” And/Or the Principle of Proportionality. *Oñati Socio-legal Series*, 3(1), 2013, p. 84.

²⁵ *Ibid.*, p. 84.

²⁶ From Nils Jareborg’s point of view, it cannot be claimed that criminal law lacks legitimacy simply because other means of social control have not been tested. (Jareborg, N. *Criminalization as Last Resort (Ultima Ratio)*, pp. 533–534). Such highly controversial indentation is presumably made to avoid the unreasonable interpretation of the *ultima ratio* principle, which would paralyze the legislative process. Therefore, one can rather agree with Andrew Ashworth’s argument that the limited effectiveness of criminalization is not its counter-argument, but rather indicates the need to seek additional ways to prevent the offence (Ashworth, A. *Principles of Criminal Law*, pp. 33–34).

only for the offences for which it is expedient to apply it. Accordingly, every moment that officials conducting criminal proceedings spend at any stage of the proceedings on resolving cases that would not be subject to criminal justice reduces the time and attention that they could devote to important cases.²⁷

Moreover, the strengthening of fundamental importance of human dignity in a democratic society leads to the increase in the demand for additional justifications for establishing criminal liability for new offences which is especially relevant to cases on which there is no public consensus.²⁸ It should be taken into account that the mere threat of any punishment, especially criminal punishment, indicates that the state power, by interfering with the private autonomy of the individual, questions his/her ability to act reasonably.²⁹ The problem deepens when the chosen criminal legal mean is not effective or is not actually used, which confirms the insufficient care from the legislator's side towards the powers entrusted to it. Therefore, the identification and evaluation of alternatives to criminal liability is important for both utilitarian and ethical reasons.

It is undeniable that it is better to invest in prevention than in punishment, as if the causes of any negative phenomenon would be timely eliminated, the negative phenomenon itself would not occur at all. However, it is equally clear that the issue of criminalizing an offence is raised as it has already occurred or will inevitably become relevant. Therefore, in this case, prevention can no longer avert the consequences that have already come about. At the same time, the imposition of criminal punishment must not deviate from its primary goal of ensuring legal order, for example, by developing prerequisites for the commission of new criminal offences and further isolation of the perpetrator from society and participation in the common national economy.³⁰

Accordingly, it has been stated that criminal law cannot be used if it is not effective, that is, it cannot prevent the relevant deed, or causes consequences at least as bad as non-criminalisation, but it can be used if it is the most effective and economical means of preventing the deed.³¹ This correlation of limiting and expanding criminal law is theoretically unquestionable, but in practice it cannot be used, as such different determinants of crime prevent the precise *ex ante* determination of the aforementioned effectiveness and economy. Therefore, taking into account the incomparable nature of various offences and their external manifestations, it is not possible to develop guidelines for observance of the *ultima ratio* principle, but it should be assessed in each specific case³² and should be taken into account in the political discussion when deciding in favour of criminalisation.³³

²⁷ Packer, H. L. *The Limits of the Criminal Sanction*. London: Oxford University Press, 1969, pp. 250, 259–260.

²⁸ Ashworth, A. *Principles of Criminal Law*, pp. 31, 33.

²⁹ *Ibid.*, pp. 25–28; Keiler, J., Roef, D. *Principles of Criminalisation*, p. 45.

³⁰ For instance, by generally criminalizing the use of intoxicating substances, the perpetrator is not only stigmatized, but also further marginalized, as the threat of punishment cannot eliminate the causes of addiction, and socially excluded, which bring about new risks of deviant behaviour to satisfy his/ her needs (Ashworth, A. *Principles of Criminal Law*, p. 34; Keiler, J., Roef, D. *Principles of Criminalisation*, p. 77).

³¹ Ashworth, A. *Principles of Criminal Law*, pp. 33–34.

³² Cf.: Keiler, J., Roef, D. *Principles of Criminalisation*, p. 84.

³³ Hörnle, T. *Theories of Criminalization*. In: *Oxford Handbook of Criminal Law*. Dubber, M. D., Hörnle, T. (eds.). Oxford: Oxford University Press, 2014, pp. 20–21. Available: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2999803 [last viewed 08.03.2025].

Accordingly, the relationship proposed by researchers that the minimum necessary criminal law intervention in the regulation of public life is the maximum possible, which is permitted by the constitution, remains an idealistic legislative formula.³⁴

The *ultima ratio* principle, which includes the obligation to assess the suitability of crime-fighting measures in a particular case, assumes *per se* that criminal liability is only one form of social control of undesirable phenomena prevention or reduction in society.

It is known that it is possible to influence an individual to achieve behaviour acceptable to the majority of society by other formal methods instead of the threat of criminal punishment, such as, for example, administrative legal and civil law means that foresee state coercion, and informal methods that include public pressure, promoting compliance with social norms.³⁵ Similarly, when assessing the need to criminalize a particular deed, it should be considered more specifically whether, depending on the area affected by the corresponding deed, it is suitable to use other specific deterrent mechanisms for its prevention – to standardize the prescriptions of acceptable behaviour (for example, the code of ethics), to establish supervisory bodies or review the existing competence (for example, ombudsman), to develop, improve and implement measures to prevent deviant behaviour (for example, social support programs), as well as to launch systematic educational publicity campaigns. In other words, other means are almost always available to ensure that a person's behaviour complies with society's expectations.³⁶

In modern rapid process of new legal norms development, this list seems naive, as such means are not actually discussed, evaluated and compared in legislative materials, although this, of course, does not mean that they do not exist in reality. Criminalisation and increasing sanctions are ideally only part of the longer-term state policy, which also includes targeted preventive measures, recorded, for example, in development planning documents.³⁷

³⁴ *García de la Torre García, F.* Crises of the Ultima Ratio Principle, pp. 51–52, 53.

³⁵ *Ashworth, A.* Principles of Criminal Law, p. 33.

³⁶ *Wohlers, W.* Criminal Law as a Regulatory Tool. In: *The Limits of Criminal Law. Anglo-German Concepts and Principles.* *Dyson, M., Vogel, B.* (eds.). Cambridge: Intersentia, 2018, pp. 236–237.

³⁷ For example, in response to the systematic domestic violence that has received public resonance, with the Law of 15 June 2023 “Amendments to the Criminal Law” (Available: <https://likumi.lv/ta/id/343148-grozijumi-kriminallikuma> [last viewed 19.03.2025]) Section 132 of the CL “Threatening to Commit Murder and to Inflict Serious Bodily Injury” and Section 132¹ of the CL “Persecution” were supplemented with a second part, strengthening criminal liability if these offences have been committed against the spouse or former spouse, or against a person with whom the perpetrator of a criminal offence is or has been in continuous intimate relationships, or against a person with whom the perpetrator of a criminal offence has a joint (single) household.

Soon after, with the Law of 6 June 2024 “Amendments to the Criminal Law” (Available: <https://likumi.lv/ta/id/352942-grozijumi-kriminallikuma> [last viewed 19.03.2025]) the Criminal Law was supplemented with Section 174¹ “Cruelty and violence against the immediate family”, providing for criminal liability for cruel or violent actions against the victim described above if it causes physical or mental suffering and if these actions do not intentionally cause bodily harm.

Although, respectively, nothing is mentioned about the existence and suitability of alternatives to criminal liability neither in the annotation of draft law No. 245/Lp14 (available: <https://titania.saeima.lv/LIVS14/SaeimaLIVS14.nsf/0/DAC4C561B0A07142C22589B1004C72BC?OpenDocument> [last viewed 05.03.2025]), nor in the annotation of draft law No. 484/Lp14 (available: <https://titania.saeima.lv/LIVS14/SaeimaLIVS14.nsf/0/C36AE52D1F08BEE0C2258AB7001F641F?OpenDocument> [last viewed 05.03.2025]), the Plan for the Prevention and Combating of Violence against Women and Domestic Violence for 2024–2029 has been developed in parallel with these amendments to the CL (Cabinet Order No. 1221 of 19 December 2024. Available: <https://likumi.lv/ta/id/357535-vardarbibas-pret-sievieti-un-vardarbibas-gimene-noversanas-un-apkarosanas-plans-2024-2029-gadam> [last

At the same time, the spontaneous legislative processes give the impression that threatening with the criminal liability by criminalizing new deeds or, for the most part, special types of the already criminalized ones, especially for the parliamentary position, is a relatively easy task to perform to find a factual basis for the rhetoric about the attention paid to the protection of public safety, in which every member of society is interested.³⁸ Moreover, it is impossible and, accordingly, unnecessary to calculate the costs of such solution, as, theoretically relying on the preventive function of criminal law, which is determined by the existence of written criminal law norms *per se*³⁹, it is not possible to even approximately determine how many criminal offences will be committed in a given reporting period. Thus, criminal law, with its traditionally inherent authority, is instrumentalized, exceeding its intended impact.⁴⁰

In this regard, it should not be ignored that criminal law does not regulate legal relations in specific area of law but is intended for the inevitability of its execution. In other words, it does not form the legal system, but rather fights against disturbances in other areas of law.⁴¹ Accordingly, the *ultima ratio* principle conceptually confirms the secondary nature⁴² of criminal law and the idea that its fragmentary or incomplete scope is its natural expression.⁴³ Therefore, the idea that criminal law, within the framework of which the most severe form of legal liability is applied, namely, criminal liability, has a subordinate role in maintaining legal order, remains true to this day.⁴⁴

viewed 19.03.2025]). According to it, the following actions are planned in several directions during the reporting period, namely, 1) preventive measures to prevent violence against women and domestic violence; 2) ensuring protection and support measures for victims of violence and their improvement; 3) strengthening the responsibility of the perpetrator of violence, providing support and rehabilitation services; 4) the development of the unified, coordinated and inclusive policy and legal framework regarding violence against women and domestic violence issues.

Regarding various private law and public law measures within Estonian legal system implemented to prevent a specific offence, namely, the domestic violence as multifaceted phenomenon, see: *Kaugia, S.* Domestic Violence in the Focus of Estonian Penal Policy and Implementation of the Law in the Light of the Istanbul Convention Requirements. *Journal of the University of Latvia. Law*, 2024, Vol. 17.

³⁸ The careless use of criminal law to demonstrate the state's active response to crises in society, sacrificing the importance of targeted prevention, is called penal populism (*Boskovic, M., Kostic, J.* Penal Populism and (Ab)use of Criminal Law. In: *Revisiting the Limits of Freedom While Living Under Threat. II.* 9–10 November 2023, Riga. Collection of research papers in conjunction with the 9th International Scientific Conference of the Faculty of Law of the University of Latvia. Riga: University of Latvia Press, 2024, pp. 80, 84).

³⁹ *Krastiņš, U., Liholaja, V., Niedre, A.* Krimināltiesības. Vispārīgā daļa. Trešais papildinātais izdevums [Criminal Law. General Part. 3rd supplemented ed.]. Riga: Tiesu namu aģentūra, 2008, p. 338.

⁴⁰ *Claessen, J.* Theories of Punishment, p. 30.

⁴¹ *Mincs, P.* Krimināltiesību kurss. Vispārējā daļa. Ar U. Krastiņa komentāriem [Criminal law course. General part. With comments by U. Krastiņš], pp. 15, 21.

⁴² *Bengoetxea, J.* Ultima Ratio and the Judicial Application of Law. *Oñati Socio-legal Series*, 3(1), 2013, p. 112.

⁴³ *Jareborg, N.* Criminalization as Last Resort (Ultima Ratio), pp. 524–525.

⁴⁴ *Mincs, P.* Krimināltiesību kurss. Vispārējā daļa. Ar U. Krastiņa komentāriem [Criminal law course. General part. With comments by U. Krastiņš], p. 24; *Herring, J.* Criminal Law. Text, Cases, and Materials. Oxford: Oxford University Press, 2004, pp. 5–7.; *Leja, M.* Krimināltiesību aktuālie jautājumi un to risinājumi Latvijā, Austrijā, Šveicē un Vācijā [Current issues of criminal law and their solutions in Latvia, Austria, Switzerland and Germany]. Riga: Tiesu namu aģentūra, 2019, p. 261; *Esakov, G. A.* Jekonomicheskoe ugovnoe pravo: Obshhaja chast' [Economic Criminal Law: General Part]. Moskva: Izdatel'skij dom Vyshej shkoly jekonomiki, 2019, p. 153.

2.2. Importance of *ultima ratio* principle in the criminalisation process

If the state authority foresees more serious negative consequences for a person for certain types of violations than for others, it seems obvious or natural to clarify the different characteristics of these violations. The importance of a generally binding obligation is given to this necessity by the principle of proportionality as a general principle of law, which determines the systematization of the legal system of a democratic state.⁴⁵ Naturally, criminal liability is provided only for the most harmful deeds.

The harmfulness as the hallmark of a criminal offence can be characterised by the significance of the interests at stake and features that increase the possibility to harming these interests and making this harm more serious, namely, the nature of the deed and the caused harmful consequences.

However, even if these reasons for criminalisation are established, then, taking into account the already mentioned repressive nature of criminal liability and the costs of criminal proceedings, it is still necessary to assess whether the goal of criminalisation can be achieved with less restrictive and more economical measures for the person. In other words, it is necessary to assess the compliance of the criminalisation intention with the *ultima ratio* principle to justify the criminalisation.⁴⁶ Therefore, compliance with this principle is considered the final criterion for criminalisation.⁴⁷

Without direct references to the *ultima ratio* principle, the need to identify alternative means of criminal liability is also clearly recognized in Latvian criminal law. Agra Reigase, who participated in the development of the Criminal Law, once emphasized as an axiom that only such harmful offences can be criminalized that can be combated only with the help of criminal punishment.⁴⁸ Describing the principles of criminalisation as criteria for the admissibility and usefulness of new deed criminalisation, which can promote the effectiveness of the particular Criminal Law norm being implemented, A. Reigase started the list directly with the usefulness of applying criminal repression, which is related to the economy of criminal liability and punishment. Therefore, the legislator is obliged to assess the necessity of methods of combating a specific type of offence. If there is a possibility to use administrative, disciplinary or other means of influence, then the application of criminal repression is not necessary.

U. Krastiņš has also stated that the severity of criminal liability requires that, when including a new norm in the Criminal Law or supplementing an existing one,

⁴⁵ Rezevska, D. Latvijas tiesiskā sistēma. Latvijas Nacionālā enciklopēdija [Legal system of Latvia. National Encyclopedia]. 21.11.2023. Available: <https://enciklopedija.lv/skirklis/25869-Latvijas-tiesisk%C4%81-sist%C4%93ma> [last viewed 14.07.2025].

⁴⁶ Keiler, J., Roef, D. Principles of Criminalisation, p. 76; Ashworth, A. Principles of Criminal Law, pp. 64–65. Failure to comply with the *ultima ratio* principle is also one of the causes of overcriminalization – criminalization of a deed without an objective necessity for the maintenance of legal order, *id est*, criminalization of a deed whose harmfulness is not increased and whose spread can be prevented or reduced by using less repressive and more economical means (Husak, D. Six Questions about Overcriminalization. Annual Review of Criminology, 2023, No. 6, pp. 269–271).

⁴⁷ One cannot fully agree with an assessment of the constitutionality of criminalization where the *ultima ratio* principle is used to determine whether specific interests are worthy of criminal law protection (Fedosiukas, O. Baudžiamoji atsakomybė kaip kraštutinė priemonė (ultima ratio), pp. 722–728). Otherwise, the scope of this principle would be expanded, as it only covers the assessment of criminalization alternatives.

⁴⁸ Reigase, A. Kriminalizācija un dekriminalizācija – krimināltiesību politikas īstenošanas metodes [Criminalization and decriminalization – methods of implementing criminal justice policy], p. 13.

the necessity, usefulness and proportionality of criminalization therein be assessed.⁴⁹ The author has named several prerequisites that should be observed in the process of criminal law norm development to determine whether there is a need to establish criminal liability for such act of behaviour. Among them is the obligation to assess whether any other educational or coercive measures exist and have been used and for how long against offenders, what circumstances contribute to the occurrence and spread of offences, and whether any attempts have been made to prevent them.⁵⁰

At the same time, although the course of criminal proceedings is undoubtedly embarrassing and unpleasant for the person, the importance of criminal liability seems to be decreasing, while also questioning the need to invest resources in fulfilling the requirements of the *ultima ratio* principle. While the Constitutional Court consistently strengthens the idea of the unconstitutionality of absolute prohibitions of holding a certain position in the Latvian legal system,⁵¹ there are fewer and fewer professions in which a convicted person would generally be prohibited from working. Moreover, sometimes a criminal sanction is actually not as severe for the person, that is, it does not cause as much suffering and impact on its future life, as other means of influence, for example, administrative fines, deprivation of economic activity licenses and permits.⁵² The question, whether a person's participation in criminal proceedings in the status of a person who has the right to defence, and a criminal record in modern times, when a person does not shy away from getting involved in unflattering situations, is a circumstance that excludes an impeccable reputation, remains open.

Furthermore, the more harmful the offence, the less attention is paid to the *ultima ratio* principle.⁵³ In these cases, it is assumed that there is a common support of society for the application of criminal liability and, consequently, a higher legitimacy of the legislator's choice, the strengthening of which does not require additional considerations.⁵⁴ Criminalisation then also has a symbolic meaning,⁵⁵ by setting the extreme limits of a person's freedom of action, which means the so-called zero tolerance towards an undesirable phenomenon. The European Court of Human

⁴⁹ *Kraštinš, U.* Ieskats Kriminālikuma vispārīgās daļas attīstības procesā [Insight into the Development Process of the General Part of the Criminal Law], p. 14.

⁵⁰ *Kraštinš, U.* Kriminālikuma izstrāde un attīstība gadu gaitā: caur atmiņu prizmu [The Development and Evolution of Criminal Law over the Years: through the Prism of Memory], p. 18.

⁵¹ Judgement of the Constitutional Court of the Republic of Latvia of 17 December 2024 in case No. 2023-47-01, para. 17.1. *Latvijas Vēstnesis*, 247, 18.12.2024.

⁵² *Ashworth, A.* Principles of Criminal, p. 33. For example, unfair commercial practices, in accordance with Section 211 of the CL "Unfair Competition, Misleading Advertising and Unfair Commercial Practices", may be punished with a fine of three to one thousand minimum monthly wages of the Republic of Latvia, whereas, in accordance with part one of Section 15² of the Law on the Prohibition of Unfair Commercial Practices (22.11.2007. Available: <https://likumi.lv/ta/id/167759-negodigas-komerccprakses-aizlieguma-likums> [last viewed 19.03.2025]), the supervisory authority may impose a fine of up to four percent of its annual turnover from business activity on any natural or legal person who implements a commercial practice within the framework of their economic or professional activities for unfair commercial practices.

⁵³ *García de la Torre García, F.* Crises of the *Ultima Ratio* Principle, p. 50; *Jareborg, N.* Criminalization as Last Resort (*Ultima Ratio*), p. 534.

⁵⁴ *Saeima*, defending the constitutionality of the part one of Section 82 of the CL "Invitation to Destroy Independence of the Republic of Latvia as a State", stated that "the independence of the Republic of Latvia is too important to risk it without provision of the criminal liability for a public call to liquidate it." (Judgement of the Constitutional Court of the Republic of Latvia of 27 May 2022 in case No. 2021-34-01, para. 3.1. *Latvijas Vēstnesis*, 30.05.2022, No. 103).

⁵⁵ *Ashworth A.* Principles of Criminal Law, p. 34.

Rights has also recognized that only criminal liability can provide adequate protection against serious offences against, for example, the physical and mental integrity of a person.⁵⁶

In addition to the aforementioned the *ultima ratio* principle, the importance of criminalisation is also relativized by the political aspect of criminalisation, which is present in any parliamentary vote. Accordingly, it is not without reason that the opinion that criminal law is political remains unchanged over time.⁵⁷ Perhaps it is even more political than other areas of law, as constitutional courts see greater freedom of action for the legislator in this area of law, possibly without interfering with the content of substantive criminal law.⁵⁸ Accordingly, the practice of constitutional courts is also inconsistent in the assessment of the criminalisation validity.⁵⁹

During the Soviet occupation, which criminal law has had a great influence on the understanding of contemporary Latvian criminal law, Marija Blūma denied the legislator's authority to confer a social danger to the offence. The prominent soviet legal scholar stated that the legislator only investigates and determines with greater or lesser precision the changing nature and degree of social danger of the offence over time, therefore, the recognition of socially dangerous deeds as crimes, or the legal fixation of their social danger, depends only on its will.⁶⁰

After the restoration of independence, this opinion, which is directed against the legislative arbitrariness of the legislator, was further developed by Andrejs Judins and Aleksejs Loskutovs. In examining the prerequisites for criminalisation, the authors limited themselves solely to the assessment of the quality of the deed, namely, the social danger or harmfulness it causes and objectively possesses.⁶¹

Although we may find this idealistic opinion conceivable, the choice made by the legislator to criminalize one or another act of behaviour in any case reflects the ideology of the legislator, which may also lack rational justification. Accordingly, we cannot support the view that the ability of criminal law doctrine, in cooperation

⁵⁶ Judgement of 7 May 2019 of the European Court of Human Rights in case *Panayotova and others v. Bulgaria*, No. 12509/13, para. 58–59. Available: [https://hudoc.echr.coe.int/eng#{%22itemid%22:\[%22001-193912%22\]}](https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-193912%22]}) [last viewed 06.03.2025]; Judgement of 14 January 2020 of the European Court of Human Rights in case *Beizaras and Levickas v. Lithuania*, No. 41288/15, para. 111. Available: [https://hudoc.echr.coe.int/fre#{%22itemid%22:\[%22001-200344%22\]}](https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-200344%22]}) [last viewed 06.03.2025].

⁵⁷ The prominent pre-war Latvian legal scholar Pauls Mincks has acknowledged that the offences differ from each other only in the negative consequences for the person determined by the legislator and the procedure in which they are applied (*Mincks, P. Krimināltiesību kurss. Vispārējā daļa. Ar U. Krastiņa komentāriem* [Criminal law course. General part. With comments by U. Krastiņš], pp. 16–17, 71); *Judins, A. Krimināltiesību politika kā kriminālpolitikas virziens. [Criminal Justice Policy as a Direction of Criminal Policy]* LPA raksti, 8, 2001, pp. 68–69; *Ķiniš, U. Krimināltiesību pamati [Fundamentals of Criminal Law]*. In: *Publisko tiesību pamati. Ievads. Ziemeļe, I., Osipova, S. (eds.). Rīga: Tiesu namu aģentūra, 2024, p. 391; Keiler, J., Roef, D. Principles of Criminalisation, p. 37; García de la Torre García, F. Crises of the Ultima Ratio Principle, p. 48.*

⁵⁸ *Hörnle, T. Theories of Criminalization, pp. 3–4.; Wendt, R. The Principle of “Ultima Ratio” And/OR the Principle of Proportionality. pp. 87–92.*

⁵⁹ *García de la Torre García, F. Crises of the Ultima Ratio Principle, pp. 45–46.*

⁶⁰ *Blūma, M. Nozieguma jēdziens un tā pazīmes padomju krimināltiesībās [Concept of an Offence and its Features in Soviet Criminal Law]*. Rīga: Pēterka Stučka LVU Redakcijas un izdevniecības daļa, 1972, pp. 49, 54.

⁶¹ *Judins, A., Loskutovs, A. Bīstamība kā noziedzīga nodarījuma pazīme. [Danger as a Feature of a Criminal Offence]*. LPA Raksti, 7, 2000, pp. 107, 116.

with specialists in the relevant field, to justify the increased harmfulness of a particular deed would allow avoiding errors in criminalisation.⁶²

Considering the mentioned above, the decision of the legislator is decisive in the adoption of any written legal norm, but the limits of its discretionary power during the formulation of the *corpus delicti* is also determined by general principles of law.

3. General binding force of *ultima ratio* principle

3.1. *Ultima ratio* principle as an expression of the principle of proportionality

The *ultima ratio* principle, as a legal and political concept approved in legal science, can be used as a doctrinal source of law in the further development of law, teleologically reducing, that is, fairly adjusting, the scope of disposition of the CL norm and accordingly limiting the number of cases subject to criminal law regulation.⁶³ However, it should be clarified whether this principle can be applied by completely preventing the individual from coming into contact with criminal law and the consumption of criminal procedural resources.

As mentioned above, the *ultima ratio* principle is intended to limit the activity of criminal law, or to deter the legislator from using criminal law, but specialists have not reached any consensus whether it is a general principle of law that derives from the basic norm of a democratic state, or just a desirable legal and political consideration from which it is possible to deviate.⁶⁴ This opinion has an invaluable importance for legal and, accordingly, actual reality. There is no certainty about the possibility for a person to exercise the rights granted to him/her if they are not ensured by the obligation of another person. The same can be said about a principle of law identified and formulated by legal researchers, which is not binding in the development and application of law.⁶⁵

Twenty years ago, Nils Jareborg stated that *ultima ratio* is for sure not a constitutional principle, but rather a consideration of legislative ethics, to which the legislator does not pay special attention.⁶⁶ It is undeniable that more and more requirements to the legislator are derived from the general principles of law existing in a democratic state, so it is not surprising that limitation of the state's criminal policy is also supported.

⁶² Rozenbergs, J. Vainas Institūts krimināltiesībās un tā nozīme noziedzīgu nodarījumu kvalifikācijā. Promocijas darbs [Institute of Guilt in Criminal Law and Its Importance in the Qualification of Criminal Offences. Doctoral thesis]. Riga: Latvijas Universitāte, 2013, pp. 79–80.

⁶³ Fedosiukas, O. Baudžiamoji atsakomybė kaip kraštutinė priemonė (ultima ratio), pp. 731–734. For instance, in cases where the disposition of the legal norm of the Special Part of the Criminal Law does not include the limitation of the *mens rea*, then, since the Criminal Law does not contain any general indications regarding criminalized forms and types of guilt, the *ultima ratio* principle can theoretically justify the non-application of criminal liability for certain offences committed through negligence.

⁶⁴ In 2012, a separate workshop was dedicated to studying this issue and the opinions of the participating researchers were summarised in the collection of articles: Bengoetxea, J., Jung, H., Nuotio, K. *Ultima Ratio. Is the Principle at Risk?* Editors' Introduction. *Oñati Socio-Legal Series*, 3(1), 2013, pp. 3–4. Even after ten years, the discussions continue – see an extensive excursion into the contradictions between the constitutional possibilities to limit criminal law and the legislator's broad room for maneuver in this area of law: García de la Torre García, F. *Crises of the Ultima Ratio Principle*, pp. 39, 47–49.

⁶⁵ García de la Torre García, F. *Crises of the Ultima Ratio Principle*, p. 49; Jareborg, N. *Criminalization as Last Resort (Ultima Ratio)*, pp. 522–523.

⁶⁶ Jareborg, N. *Criminalization as Last Resort (Ultima Ratio)*, pp. 521, 524.

The mere existence of the *corpus delicti* formulated in the Criminal Law due to the threat of criminal punishment always provides a restriction of an individual's freedom of action, the unhindered realization of his/her will, moreover, criminal punishment is the restriction of personal freedom and private life, occupation or reduction of property. Therefore, criminalisation is always an interference with some human rights.⁶⁷ It can be concluded that when deciding on the prohibition of some act of behaviour by the means of criminal law, the provisions on the restriction of human rights should always be taken into account.⁶⁸

In accordance with the traditional test of constitutionality of the restriction of fundamental rights established by constitutional courts, it is assessed, firstly, whether the contested legal norm has been established by a duly adopted law, secondly, whether there is a justifiable legitimate goal and, thirdly, whether the restriction is necessary in a democratic society or whether it is proportionate.

The first point is related to the quality of the legal norm and, accordingly, the predictability of the risk of criminal liability, which is more related to the proficiency of the legal technique, the second point is relatively simple to fulfil, indicating by the legislator the need to protect some socially significant interest. In turn, the proportionality assessment examines, firstly, whether the means selected by the legislator are appropriate for achievement of the legitimate goal, which is related to the justification of the harmfulness of the offence, secondly, is there any other lenient means for achievement of the legitimate goal with equal efficiency and, thirdly, whether the restriction imposed on the person outweighs the benefits to society.⁶⁹

Accordingly, the *ultima ratio* principle is included in one of the criteria of the principle of proportionality as a general principle of law, namely the assessment of the existence of any other more lenient means for achievement of the legitimate goal with equal efficiency.⁷⁰ Therefore, it can be logically concluded that when deciding on criminalisation, there should be a stricter assessment of proportionality, taking into account the negative consequences caused to the person in case of initiating criminal proceedings and imposing a criminal penalty.⁷¹

Paradoxically, it is often easier to criminalize a deed in Latvian legislative practice, than to establish administrative liability for it, which contradicts a *minore ad maius* argument. For example, specialists in administrative proceedings insist on using the means available in it to achieve the desired action of the person. That is, firstly, the principle of the priority of the administrative act must be observed, according to which administrative liability is not foreseeable if compliance with legal norms can be effectively achieved by issuing an appropriate administrative act, establishing the obligation to eliminate non-compliance or fulfil requirements within

⁶⁷ *García de la Torre García, F.* Crises of the Ultima Ratio Principle, pp. 37–38.

⁶⁸ *Tuori, K.* Ultima Ratio as a Constitutional Principle. *Oñati Socio-legal Series*, 3(1), 2013, pp. 10, 11.

⁶⁹ See: *Balodis, K.* Pamattiesību ierobežojuma konstitucionalitātes izvērtēšana Satversmes tiesas praksē [Assessment of the Constitutionality of a Restriction on Fundamental Rights in the Practice of the Constitutional Court]. 11.12.2015. Available: <https://www.satv.tiesa.gov.lv/runas-un-raksti/pamattiesibu-ierobejojuma-konstitucionalitates-izvertesana-satversmes-tiesas-prakse/> [last viewed 08.03.2025]; *Lenārtss, K., Gutjeress-Fonss, H. A.* Eiropas Savienības Tiesas interpretācijas metode [Methods of the Interpretation of the European Court of Justice]. Rīga: Tiesu namu aģentūra, 2022, p. 145.

⁷⁰ See: *Tuori, K.* Ultima Ratio as a Constitutional Principle, pp. 9–11; *García de la Torre García, F.* Crises of the Ultima Ratio Principle, p. 45.

⁷¹ *Wendt, R.* The Principle of “Ultima Ratio” And/Or the Principle of Proportionality, p. 87; *Stuckenberg, C. F.* The Constitutional Deficiencies of the German Rechtsgrundsatzlehre, *Oñati Socio-legal Series*, 3(1), 2013, pp. 37–38.

an appropriate period, and secondly, administrative penalties for voluntary non-compliance with the administrative act must be refused, whereas it can be ensured by measures intended for the forced execution of the administrative act in question.⁷² At the same time, such approach is explained by the requirement of legal certainty and clarity, so that the same factual circumstances are examined in a single administrative proceeding.⁷³

Taking into account the aforementioned, one can agree with the opinion according to which *ultima ratio* is considered an expression of the principle of proportionality in criminal law.⁷⁴ Accordingly, the opinion expressed in Lithuanian criminal law that the *ultima ratio* principle itself has the status of the general principle of law, which limits the freedom of the legislator to criminalize deeds, should be clarified.⁷⁵

There is also the opinion that the *ultima ratio* principle should be considered conceptually and methodologically before assessing proportionality, as while the *ultima ratio* principle solves the issue of whether criminal law should be used at all to address harmful conduct, proportionality concerns the issue of how much criminal law should be used, if it is assumed that it should be used.⁷⁶ This cannot be accepted as, firstly, the harmfulness of the relevant deed cannot be assessed in the context of the *ultima ratio* principle and, secondly, options for preventing the deed that differ from criminalisation must be discussed in the assessment of alternative means of restriction.

3.2. *Ultima ratio* principle in the practice of the Constitutional Court

The legislator's obligation to clarify whether there are other, less restrictive means to achieve the primary goal of the criminalisation, that is, the prevention of the undesirable deed, is related to the principle of good legislation developed by the Constitutional Court of Latvia, which is binding on the legislator. This narrows the legislator's freedom of action by specifying certain standards of the legislative process.⁷⁷ With this regard, the legislator must, among other things, justify the restriction of fundamental rights with explanatory research, assess the social impact of the planned regulation, and consider the risk forecasts provided by industry specialists.⁷⁸ In case of the violation of the principle of good legislation, the relevant legal norm shall be recognized as unconstitutional if the violation is

⁷² Māliņa, I. Jaunu administratīvo pārkāpumu sastāvu veidošana [Formation of New Administrative Offences]. In: Administratīvo pārkāpumu tiesības. Administratīvās atbildības likuma skaidrojumi. Danovskis, E., Kūtris, G. (eds.). Rīga: Tiesu namu aģentūra, 2020, pp. 54–55.

⁷³ The Judgment of the Supreme Court of the Republic of Latvia of 15 February 2019 in case No. SKA-946/2019, para. 6. Available: <https://at.gov.lv/lv/tiesu-prakse/judikaturas-nolemumu-arhivs/administrativo-lietu-departaments/hronologiska-seciba?lawfilter=0&year=2019> [last viewed 10.03.2025].

⁷⁴ Tuori, K. *Ultima Ratio* as a Constitutional Principle, pp. 10–11; Dambrauskienė, A. *Ultima ratio principo*, pp. 121–122.

⁷⁵ Fedosiukas, O. Baudžiamoji atsakomybė kaip kraštutinė priemonė (*ultima ratio*), pp. 722, 734. It should be noted that another Lithuanian author considers such approach unreasonably bold, although does not offer other ways to ensure the practical effect of the *ultima ratio* principle (Dambrauskienė, A. *Ultima ratio principo*, p. 124).

⁷⁶ Bengoetxea, J. *Ultima Ratio* and the Judicial Application of Law, p. 111.

⁷⁷ Pleps, J. Satversmes 21. panta tvērumš: parlamenta autonomija likumdošanas procesā [Scope of Article 21 of the Constitution: Parliamentary Autonomy in the Legislative Process]. In: Starptautisko un Eiropas Savienības tiesību piemērošana nacionālajās tiesās. Latvijas Universitātes 78. starptautiskās zinātniskās konferences rakstu krājums. Rīga: LU Akadēmiskais apgāds, 2020, pp. 350, 357.

⁷⁸ Rezevska, D. Labas likumdošanas princips un likumdevēja rīcības brīvība [Principle of Good Legislation and the Legislator's Discretion], p. 12.

essential, that is, if, in the event of compliance with the procedure, a substantively different decision would have been adopted, namely one that would comply with the Constitution, reasonably restricting fundamental rights.⁷⁹

The Constitutional Court has so far considered the *corpus delicti* in only a few cases and accordingly has rarely assessed the constitutionality of the dispositions of the Criminal Law norms. At the same time, the definition of the *ultima ratio* principle and the related prerequisites for criminalisation have not been *expressis verbis* used in the reasoning.⁸⁰

Criminalization of a deed has been declared unconstitutional only once. In the judgment of 29 October 2003 in case No. 2003-05-01 the Constitutional Court assessed the constitutionality of the restriction on freedom of expression established by Section 271 of the CL “Defamation and Injuring Dignity of a Representative of Public Authority or Other Public Official”.⁸¹ The Constitutional Court did not find the requirement of proportionality observance, assessing only whether the benefit that society derives from the relevant restriction is greater than the loss that the restriction causes to other persons. Accordingly, it was recognised that the definition of public official was provided too broadly, accordingly determining an unreasonably wide range of protected public officials. The Constitutional Court did not emphasise the need to assess whether there were other less restrictive means for the achievement of the legitimate goal, such as civil liability, which was directly specified by the applicant and the invited persons. The court listed possible additional mechanisms that ensure the fulfilment of ethical requirements in the media environment, namely the legal regulation that determines the framework for journalists’ actions, the code of ethics, the establishment of special supervisory bodies (mass media council, press ombudsman), but did not justify whether and how they affect the use of criminal law measures.

Later the Constitutional Court assessed the constitutionality of the restriction on the right to private life specified in Section 253² of the CL “Unauthorised Production, Acquisition, Storage, Transport and Transfer of Narcotic and Psychotropic Substances for the Purpose of Sale and Unauthorised Sale” in its judgment of 26 January 2005 in case No. 2004-17-01.⁸² Recognizing the restriction as being compliant with the Constitution, the court described in detail the social necessity of the restriction in a democratic society. Whereas, with regard to the possibilities of applying other less restrictive means to achieve the legitimate goal, the court only generally stated the applicant’s own reference to the necessity of compulsory drug addiction treatment, that is, it was not effective, since without the individual’s own will and active involvement in the treatment process, positive results could not actually be achieved.

⁷⁹ Rezevska, D. Labas likumdošanas princips un likumdevēja rīcības brīvība [Principle of Good Legislation and the Legislator’s Discretion],, p. 13.

⁸⁰ The following are the judgements in which the constitutionality of the criminalization of the deeds has been exactly assessed. It should be noted that in its judgment of 16 December 2008 in case No. 2008-09-0106 (Latvijas Vēstnesis, 18.12.2008, No. 197) and judgment of 21 February 2019 in case No. 2018-10-0103 the Constitutional Court assessed the quality of the Criminal Law norms and the corresponding legislative process in the context of the principle of legality of criminal law.

⁸¹ Judgement of the Constitutional Court of the Republic of Latvia of 29 October 2003 in case No. 2003-05-01, para. 9.2, 11.1, 18, 31.1, 35. 3.1., Latvijas Vēstnesis, 152, 30.10.2003.

⁸² Judgement of the Constitutional Court of the Republic of Latvia of 26 January 2005 in case No. 2004-17-01, para. 14. Latvijas Vēstnesis, 16, 28.01.2005.

Finally, the Constitutional Court assessed the constitutionality of the part one of Section 82 of the CL “Invitation to Destroy Independence of the Republic of Latvia as a State” in the context of the possible restriction of freedom of expression in its judgment of 27 May 2022 on the termination of proceedings in case No. 2021-34-01.⁸³ The Constitutional Court, conducting a broad systemic and teleological interpretation of the legal norm, indicated the boundaries of the scope of the composition of the criminal offence, namely that the legal norm, despite its wording, in accordance with its purpose and meaning, provides criminal liability only for a certain type of public call to liquidate the independence of the Republic of Latvia, namely, for one that poses a real threat to the interests of the state and society and incites to action that actually allows achieving the purpose of the call. Thus, a constitutional interpretation of the legal norm was determined, which apparently restricts the right to freedom of expression to an extent consistent with the Constitution. The Constitutional Court did not carry out the assessment of the norm in accordance with the criteria for restricting fundamental rights and accordingly has not commented on whether the importance of the protected interests is of any relevance when the legislator decides on the suitability and necessity of alternative rights protection means.

The approach of the Constitutional Court can probably be explained by the principle of self-limitation. In accordance with this principle a particular case can only be assessed to the extent that it is possible to apply legal arguments, the observance of which is required by the rule of law and which are distinguishable from political arguments, which in turn determine the achievable goal. They are closely related, but often there are no strict legal boundaries for solving the issues under discussion and it depends mainly on political purpose, which is determined by democratically legitimized political state bodies.⁸⁴ Defending the need to balance functional separation of state power and at the same time acknowledging that, in accordance with the above mentioned, criminalisation is not possible without politically motivated choices, they also cannot be arbitrary without awareness of the context and consequences of the decision.

Summary

Ultima ratio is a fundamental principle of criminal law, according to which criminal law should be used only as a last measure for the effective suppression of a harmful deed, taking into account the repressive nature of criminal law and the costs of criminal justice. Accordingly, the *ultima ratio* principle confirms the secondary role of criminal law in the maintenance of legal order.

The *ultima ratio* principle is the criminal law expression of the principle of proportionality as a general principle of law, assessing the constitutionality of the human rights restriction. It corresponds to the criterion of the principle of proportionality, according to which it is assessed whether there are more lenient alternative means for achievement of the legitimate goal defined by legislator with equal efficiency. Accordingly, the *ultima ratio* principle limits the legislator's discretionary powers in the creation of Criminal Law norms, and at the same

⁸³ Judgement of the Constitutional Court of the Republic of Latvia of 27 May 2022 in case No. 2021-34-01, para. 18–19. *Latvijas Vēstnesis*, 103, 30.05.2022.

⁸⁴ Judgement of the Constitutional Court of the Republic of Latvia of 19 November 2013 in case No. 2013-09-01, para. 10. *Latvijas Vēstnesis*, 227, 21.11.2013.

time the principle can be used in the interpretation and judicial development of the Criminal Law norms already existing.

The *ultima ratio* principle is the final criterion of criminalisation, which requires the assessment of the negative impact of criminalization even if the relevant deed has increased harmfulness. As in the evaluation of harmfulness of the undesirable deed in question, it is impossible to avoid political considerations in the determination of alternative means of criminalisation, but this does not exempt the legislator from their identification and assessment of their suitability and efficiency.

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Journal of the University of Latvia
Law No. 19
Latvijas Universitātes žurnāls
Juridiskā zinātne Nr. 19

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