*Jolanta Zajančkauskienė, Rima Ažubalytė, Oleg Fedosiuk*

# Conclusions

Coherence in law, including criminal justice, is a minimum condition for rationality. Coherence is not superior to other values; however, it is believed that coherence should be pursued in every area of criminal justice to avoid arbitrariness and injustice. At the very least, efforts should be made to correct the most glaring inconsistencies, errors, or discrepancies, although it is sometimes difficult, if not impossible, to agree on what full coherence really is.

The authors of this edited volume therefore draw conclusions, make suggestions, and raise questions for discussion after researching multiple varying areas of criminal justice in the context of coherent regulation and its application.

## Part I. The Search For Coherence in Substantive Criminal Law

In this part, the following essential conclusions were made:

1. The lack of certainty regarding the essential elements of trafficking in humans, such as the purposes of exploitation and the abuse of a position of vulnerability, creates the risk of the incoherent and excessive application of liability for this serious crime. Legal ambiguity in this area can lead to the over-criminalization of some social problems, such as illegal work, poor working conditions, etc. Such practices would certainly not meet the needs of a coherent fight against human trafficking. To avoid this, the determination of the legal elements in specific cases cannot be based solely on the text of the law and must instead correspond to the essence of the concept of human trafficking and the goals of its criminalization as declared in international law and European Union legal acts. Therefore, when recognizing the existence of real exploitation or such an intent, it is necessary to assess not only the formal list of areas of exploitation, but also: what real damage (discrimination, injustice, humiliation, disease) the victim has experienced or could experience as a result of the evaluated behavior; how much the exploiters benefited from it; whether this behavior correlates with the usual methods of traffickers' activities and control of victims, etc.

   The abuse of vulnerability as a legal element of human trafficking is also an extremely contextual concept, and its application must consider not only the situation of the victim and their life, but also other aspects of the case that allow the legal significance of the victim's consent to the malicious offers of traffickers to be negated.

2. The experiences of countries that have decriminalized drugs show that the consequences of such decriminalization practices are not inherently harmful, as previously thought. Countries with strict prohibitionist stances show increases in drug use, while countries with coherent decriminalization approaches show decreases in drug use, although there are discrepancies between the two scenarios that require more detailed analysis of these figures. There is growing global momentum toward a coherent approach, as countries introspectively evaluate their existing drug policies and consider more coherent and sustainable alternatives.

   The key to this dialogue is to achieve legal coherence between criminalization and decriminalization, while trying to understand the possible consequences of drug-related legislation on people's consumption habits. Legal frameworks need to be formulated in a way that is coherent with public health objectives, do not encourage drug use and do not disproportionately punish users, especially those who use light drugs occasionally without causing harm. The greatest threat is the lack of legal coherence, leading to criminal consequences and the dangers of unregulated drug markets.
3. Based on research on sentencing for offenses against justice in Lithuania, it can be observed that courts usually impose non-custodial sentences for this type of crime. Moreover, courts further dilute the penal policy against crimes against justice by combining sentences, usually by adding only a part of the sentence that is close to the legal minimum, or by over-applying the consolidation of sentences.

   A study of the laws and sentencing practices of other countries shows that the criminal policy of Lithuania in the fight against crimes against justice, in the case of obstructing the investigation or influencing the participants in the case, both at the level of legislation and case law, is considerably more lenient than that of the UK or the USA in this regard.

   Thus, in the norms providing for criminal liability for crimes against justice when obstructing the investigation of a case, the CC of Lithuania lacks coherence both with other norms of the Special Part and with the norms of the General Part. The penalties for the above-mentioned crimes are incoherent and too lenient in relation to other provisions of the Special Part of the CC, which provide for liability for similar crimes. The rules on the cumulation of punishments provided for in the General Part of the CC are not in line with the objectives of punishment and unjustifiably expand the use of cumulation of punishments, leading to a situation where, in cases of serious or very serious crimes, crimes against justice are in fact not punished.

4. The coherent approach that has been arrived at allows stalking to be seen as a repetitive act of a person that is intimidating in nature, disturbing, and unsettling. It is the repetitive nature of the acts carried out, which are geared toward creating a sense of fear and insecurity, that is the main identifying feature of stalking.

   A coherent approach to stalking is necessary to better understand its nature and the application of criminal responsibility. Unlawful acts of stalking are usually regulated by separate norms in national criminal laws, with the names of the norms specifically referring to unlawful stalking. However, acts constituting the content of unlawful stalking may render a person criminally responsible, even if the offense specifically referred to by that name does not exist in criminal law. The norm of systemic intimidation (Art. 145(2) of the CC) applied in Lithuanian case law is an excellent example of this. Systematic intimidation includes all repeated acts of a person that cause fear, anxiety, insecurity, and uncertainty. Thus, even before the new independent stalking norm was introduced, acts of stalking in Lithuania were subject to criminal liability as systematic intimidation. The criminal offense defined as stalking did not exist in the CC, but this did not affect the legal assessment of repeated acts of an intimidating nature in any way. The practical application of the new offense of unlawful stalking will have to identify the criteria that will enable this offense to be distinguished from the offense of systematic intimidation.
5. After summarizing the research conducted, it can be concluded that when separating criminal and administrative liability, it is necessary to consider the severity and nature of the violation of the law. Administrative sanctions imposed for certain illegal actions which are considered particularly serious may not be a strong enough response. At the same time, criminal sanctions may be chosen when it is considered important to emphasize strong disapproval to ensure deterrence. Including a conviction in a criminal record can have a particularly dissuasive effect. An administrative sanction can often be decided on and implemented immediately, avoiding lengthy and costly procedures. For this reason, administrative sanctions may be considered in areas where, for example, infringements are not very serious or particularly numerous, as well as in areas where administrative sanctions and procedures are appropriate and effective for other reasons (e.g., complex economic evaluations).
6. The coherent application of the principles of criminal jurisdiction in relation to criminal acts committed abroad by Lithuanian citizens and persons permanently residing in Lithuania can only be possible if it is understood that any principle has individual grounds for its application and a specific

purpose, which cannot be overturned by a literal interpretation of the norms establishing it. In summary, it is the case that:

6.1. The determination of the place of commission of a criminal act is also an important basis for the application of each principle of criminal jurisdiction, and the rule(s) governing it must therefore be set out in an independent article of the CC and be separate from the territorial principle. The system of jurisdictional principles currently existing in the Lithuanian CC must be expanded by introducing at least a passive personality principle, which would be highly effective in solving the problem that is gaining momentum, whereby persons located in Lithuania are victimized by cyber-fraud committed outside the territory of Lithuania.

6.2. The flag principle should also be regulated in a separate article of the CC, the key aspect of which should be the understanding that international law may establish rules that allocate jurisdiction between the coastal state and the state of registration of a vessel, or between the host of the airspace and the state of registration of an aircraft of a foreign state.

6.3. Using various methods of interpretation of the legal norm, it is also apparent that Lithuanian citizens and persons permanently residing in Lithuania are liable for crimes committed outside the territory of Lithuania and referred to in Article 7 of the CC on the basis of the universal principle only if it is not possible to apply jurisdictional principles that are higher in the hierarchy (territorial, flag, or passive personal), and only in the case of crimes of high seriousness for which universal jurisdiction is established in accordance with the provisions of a specific international agreement. The application of the universal principle must also respect the rules on the allocation of jurisdiction laid down in the relevant international treaties.

6.4. The requirement of the double criminality of an act, established in Article 8(1) of the CC of Lithuania and linked only to the law in force in the territory of the other state, blocks the more coherent application of the principle of active personality and the principle of the protection of state interests. To ensure the coherent interaction of the principles of extraterritorial jurisdiction, Article 8(1) of the CC should be amended as soon as possible. Article 8(3) of the CC should also be modified to provide that a Lithuanian citizen or a person permanently residing in Lithuania who commits one or more of the crimes referred to in this provision outside the territory of Lithuania shall be liable to prosecution, irrespective of whether the act committed is punishable at the place of commission of the crime.

## Part II. The Transformation of Criminal Procedure Law in Context of Coherence

Procedural criminal law is more influenced by international and EU law than substantive criminal law. The consistency of procedural rights across EU countries has already been extensively studied. Meanwhile, in the area of evidence and the use of technology, the search for consistency in criminal procedure law is currently intensifying.

In this part of the monograph, the following essential conclusions were made:

7. In 2023, Regulation (EU) 2023/1543 of the European Parliament and of the Council on European Production Orders and European Preservation Orders for electronic evidence in criminal proceedings and for the execution of custodial sentences following criminal proceedings was adopted. This legal regulation, it would seem, should have solved the problems related to the challenges that electronic data collection issues are subject to in the EU. The aim was not only to create a fast, efficient data collection process, but also to develop a model of electronic evidence collection that would allow the law enforcement authorities of the Member States to avoid mutual contact with the law enforcement authorities of other countries, and instead to establish direct contact with the addressees, i.e., service providers (or their representatives).

7.1. Unfortunately, an analysis of the existing regulatory framework for the gathering of evidence (including electronic evidence) (EIO, Regulation on the Taking of Electronic Evidence) suggests that the Regulation, in order to ensure the timely and efficient gathering of evidence, lacks provisions ensuring the admissibility of such evidence before national courts.

7.2. The provisions of the Regulation on the Taking of Electronic Evidence are characterized by their fragmentary nature, which is the result of a lack of certain safeguards that are particularly emphasized in legal practice. In particular, the selective nature of the process of refusal to recognize and execute orders for the production of electronic evidence, the lack of safeguards for the rights of the individual, the lack of procedural guarantees, and the specificity of the process of collecting, recording, and transmitting electronic evidence stored by a private body (a service provider) all mean that the admissibility of such evidence in national courts may be seriously called into question.

7.3. To avoid obstacles to the admissibility of electronic evidence collected outside the territory of the national State in which the trial is taking place, it was necessary to bring the principal provisions of the Regulation in line

with those of the Directive regarding EIO in criminal matters. At the same time, it should be emphasized that other measures have also been proposed in the academic literature that could assist in reducing the fragmentation, fundamental inconsistency, and excessive heterogeneity that exists concerning the legal instruments of criminal justice within the EU. These include applying the doctrine of Common Minimum Standards to all legal instruments of judicial cooperation, without exception.

8. In criminal cases relating to cybercrime, the quality of the proof-taking process can often be an issue when it comes to obtaining, presenting, verifying, and assessing electronic evidence.

8.1. One of the main reasons for this relates to the peculiarities of this type of evidence: 1) its instability, as electronic evidence can be altered easily, both due to the specificities of the operation of the information systems and intentional (or negligent) human activity; 2) the difficulty of tracking the changes made; and 3) the circumstances relevant to the case are usually determined by a person with special knowledge that is not held by the other parties involved in the criminal procedure.

8.2. The assessment of the reliability of electronic evidence in criminal proceedings is complex. Once it has been established that such evidence meets the requirements of correlation and admissibility, the assessment of its reliability also considers whether the preservation of the authenticity, integrity and accountability of electronic evidence has been guaranteed during the proof-taking process.

8.3. In the interests of coherent regulation, legislation should not give priority to evidence based on its form. In accordance with the principle of technological neutrality, electronic data, irrespective of the technology that generated or processed them, should be admissible as evidence in criminal proceedings if they fulfil the purpose of evidence, its function in criminal proceedings and the other requirements laid down for evidence.

9. The recovery of illegally obtained property within the framework of criminal proceedings, without being linked to a criminal conviction, is based on the origins of such property, which makes the seizure of such property a civil measure rather than a punishment (a criminal measure). Nevertheless, non-conviction forfeiture as a restriction on the right to property must meet all the general requirements for such restriction.

9.1. The presumption of innocence, including the allocation of the burden of proof, which determines the proof of a person's guilt and of a conviction-based confiscation in a criminal proceeding (beyond a reasonable doubt), may not apply in a proceeding to prove a non-conviction-based (NCB) confiscation. An analysis of EU law and both ECtHR and national constitutional jurisprudence leads to the conclusion that the "follow-the-money" approach allows for the seizure of assets not only in the absence of a criminal conviction, but also by applying the civil standard of proof – the principle of the balance of probabilities and the rebuttable presumption of the illegality of the asset.

9.2. The grounds for extended confiscation, despite the latter being normally applied in criminal proceedings against a convicted person, may not be assessed according to the standard of proof of a criminal charge. This means that the guilt of a person will be proved according to the presumption of innocence, while the grounds for extended confiscation will be proved according to the principle of the balance of probabilities.

9.3. NCB confiscation from a third party in criminal proceedings requires not only an effective remedy for the rights of the third party, but also a particularly careful reasoning of NCB confiscation, as the final act (conviction) cannot contain statements that violate the presumption of innocence of a third party who has not been criminally charged.

9.4. In view of the difficulty involved in a person rebutting the presumption of the illegality of assets, if the national legislation provides for a wide range of NCB confiscation possibilities, courts have the duty to:
- apply the principle of proportionality, both when deciding on the legitimate aim of NCB confiscation and on the scope of such confiscation;
- apply the rule of evidence for NCB confiscation, according to which a person's mere inability to prove that their property was acquired by lawful means is not sufficient for the application of NCB confiscation.

10. The category of coherence implies that a uniform approach to the interpretation and application of the law must be maintained and, accordingly, the predictability of legal decisions made by the courts must be ensured. A rational judge should seek coherence, consistency, and internal compatibility in their decisions. Studies conducted by psychologists and other specialists show that judges use accurate, rational, and logical, and intuitive decision-making methods when dealing with cases. Incoherence (through

the prism of predictability) is a possible (or even inevitable) product of such a decision-making process. It is important to seek coherence between human nature and legal regulation, i.e., to accept human imperfections and to try to optimize them by applying certain procedures or creating appropriate constructs. Forming certain general models of legislative regulation that help to ensure coherence in the evidence evaluation process is an institutional task. Therefore:

10.1. The legislator, in cooperation with the courts and psychologists, should review the existing substantive and procedural norms and judicial (and non-judicial) procedures in order to reduce the harmful effects of cognitive factors on judicial decision-making. If necessary, new means should be adopted to affect this change.

10.2. In the case of Lithuania, the following must be considered: 1) adjusting the procedure relating to the announcement of a person's record of previous convictions before the examination of evidence; and 2) introducing an additional procedure relating to the prior evaluation of inadmissible evidence.

11. The choice between an oral and written process depends on numerous factors, including the country's judicial system and the role of the appellate court in it, the nature and complexity of the case and the parties involved. A coherent decision can only be made by carefully evaluating the advantages and disadvantages of both written and oral procedures.

11.1. The written procedure in the appellate court is not established as an absolute limitation of the right to an oral process. Namely, the court is given an opportunity, not an obligation, to try a criminal case via a written process. Therefore, the court must decide if the application of a written process in specific legal proceedings will be reasonable and justified.

11.2. The appellate court, when choosing the type of case review process, must carefully evaluate whether the selected type of case review will ensure the right of the accused to a fair trial – even in extraordinary circumstances. The court must choose the type of process that both guarantees safety and minimally restricts the rights of the persons involved in the process, including those of the accused, especially in cases when the outcome of the case may significantly worsen the condition of the accused and the involvement of the accused in the court process is much more important than deciding only on matters related to the application of the law.

12. The coherent integration of new instruments in criminal procedure, although based on the premise of procedural efficiency, must, considering the fundamental principles of criminal procedure, be understood first and foremost as a guarantee of fair proceedings. Remote criminal procedure, which does not per se conflict with the logos of criminal procedure, remains an exceptional form of organization of proceedings which may not be applied as a judicial imperative that is justified solely on the grounds of procedural promptness. Therefore:

12.1. The legislator's commitment to providing the best functionality to criminal proceedings through the appropriate integration of technological tools must be based on the principle of balance, where such enabling should not create preconditions for arbitrariness on the part of the decision-making body and unjustified restrictions on the rights of the parties to the proceedings.

12.2. Although remote criminal proceedings are seen as a threat to the fundamental safeguards of a fair adversarial procedure and treated as an exception in the doctrine, empirical studies show that, in the judicial practice of Lithuania, this has become a routine procedural decision of the court predetermined by an agreement reached between the parties involved in the proceedings.

12.3. The analysis of the Lithuanian case shows that the regulation model – where remote criminal procedure has been legitimized in the law but the legislator does not assume the responsibility of establishing the standards developed by the ECtHR's jurisprudence with regard to the means of safeguarding individual rights of defense at the level of a law, and instead transfers this obligation to implementing legal acts or simply to the emerging case law – is flawed and poses risks to the safeguards of the right to a fair trial.

Jolanta Zajančkauskienė / Rima Ažubalytė /
Oleg Fedosiuk (eds.)

# Towards Coherence in Criminal Justice

## Challenges, Discussions And/Or Solutions

PETER LANG

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