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Justinas
BAGDŽIUS

Exemption from criminal liability under surety

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Academic supervisor – Prof. Dr. Jonas Prapiestis (Vilnius University, Social Sciences, Law – S 001).

This doctoral dissertation will be defended in a public meeting of the Dissertation Defence Panel:

Chairman – Doc. Dr. Haroldas Šinkūnas (Vilnius University, Social Sciences, Law – S 001).

Members:
Prof. Dr. Aurelijus Gutauskas (Vilnius University, Social Sciences, Law – S 001),
Prof. Dr. Jevgenij Machovenko (Vilnius University, Social Sciences, Law – S 001),
Doc. Dr. Libor Klimek (Matej Bel University Banska Bystrica, Slovakia, Social Sciences, Law – S 001),
Prof. Dr. Vidmantas Egidijus Kurapka (Mykolas Romeris University, Social Sciences, Law – S 001).

The dissertation shall be defended at a public/ meeting of the Dissertation Defence Panel at 11 am. on 15 December 2022 in Kazimieras Leonas Sapiega (302) room of the Law Faculty of Vilnius University.
Address: Saulėtekio av. 9, LT–10222, Vilnius, Lithuania.

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Justinas
BAGDŽIUS

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Mokslinis vadovas – prof. dr. Jonas Prapiestis (Vilniaus universitetas, socialiniai mokslai, teisė – S 001).

Gynimo taryba:
Pirmininkas – doc. dr. Haroldas Šinkūnas (Vilniaus universitetas, socialiniai mokslai, teisė – S 001).
Nariai:
prof. dr. Aurelijus Gutauskas (Vilniaus universitetas, socialiniai mokslai, teisė – S 001),
prof. dr. Jevgenij Machovenko (Vilniaus universitetas, socialiniai mokslai, teisė – S 001),
doc. dr. Libor Klimek (Matej Bel University Banska Bystrica, Slovakija, socialiniai mokslai, teisė – S 001).
prof. dr. Vidmantas Egidijus Kurapka (Mykolo Romerio universitetas, socialiniai mokslai, teisė – S 001).

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1. SUMMARY

1.1. RELEVANCE AND PROBLEMS OF THE RESEARCH

The preamble of the Constitution of the Republic of Lithuania (hereinafter referred to as the Constitution) enshrines the aspiration of an open, fair, harmonious civil society and the rule of law (Constitution of the Republic of Lithuania, 1992). This aspiration, as a fundamental value constant for the development of society and the state, is materialized by legal norms in the regulation of public legal relations. Legal reconciliation can be achieved even in the strictest branches of all the law – criminal law (Baranskaitė, Prapiestis, 2011). Modern criminal law is increasingly moving away from the Talion principle. The state's response to a criminal act committed by a person and legal measures of repressive effect is increasingly combined with humane, economic, and, most importantly, fair impact on perpetrators (Baranskaitė, 2009).

The changing paradigmatic approach of modern criminal policy in Western European countries focuses on the restoration of social peace as a greater goal than punishing the perpetrator (the concept of restorative justice). States at the national level are searching for alternatives to traditional repressive criminal law measures (Graebseh, Burkhardt, 2015), as well as measures to speed up the resolution of the issue of criminal responsibility (Jovanovič, Stanisavlevič, 2013). The new (criminal) legal approach, which is justified by the strengthening positions of the application of the expediency (opportunism) principle, and the so-called "diversion", when a person who may have committed a criminal act, is not tried and punished by punishment, becomes an inevitable part of the modern criminal process and law (Ažubalytė, 2001). Law enforcement institutions are given more and more power to decide whether, considering the public interest, it is expedient and effective to initiate criminal proceedings against a person (Tak, 2008, p. 54). These trends do not overtake the legal development of Lithuania

either – on 2000 September 26 after the adoption of the Criminal Code of the Republic of Lithuania (hereinafter – CC), a new direction of the independent criminal policy of Lithuania was established. The criminal law not only established criminal acts and punishments for committing them but also significantly expanded measures to alleviate the situation of the perpetrator: the possibility of mitigating criminal liability or punishment and exemption from them (Prapiestis, Švedas G., 2011).

Exemption from criminal liability in the CC system is enshrined in Chapter VI of the CC "Exemption from criminal responsibility", which provides for seven general types of exemption from criminal responsibility: exemption from criminal responsibility when a person or act loses its dangerousness (Article 36 of the CC), due to the insignificance of the crime (Article 37 of the CC), when the perpetrator and the victim reconcile (Article 38 of the CC), when there are extenuating circumstances (Article 39), after actively helping to uncover criminal acts committed by members of an organized group or criminal association (Article 39^1 of the CC), the release from criminal liability of the informant (Article 39^2 of the CC) and under surety (Article 40 of the CC). The General Part of the CC also provides for the possibility of exempting from criminal liability a person recognized by the court as a limited liability (Article 18, Part 2 of the CC), as well as a person who committed a criminal act while overheard or intoxicated against his will, as a result of which he was unable to understand the dangerousness of his behavior (Article 19, paragraph 2 of the CC) and the release of a minor from criminal liability (Article 93 of the CC). The Special Part of the CC provides for ten more separate cases where a person, under certain conditions, can be exempted from criminal responsibility for committing a specific criminal act[1].

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[1] Such possibility is provided for in Article 114, Part 3, Article 147, Part 3, Article 147^2, Part 2, Article 157, Part 3, Article 189^1, Part 2, Article 226,

Although the CC of Lithuania establishes several possibilities when a person who has committed a criminal act may not be prosecuted but may be released from it, nevertheless, the conducted scientific studies showed a general regional trend that the bloc of Eastern and Central European countries, compared to the countries of Northern, Western and Southern Europe convicts several times more suspects (74.7% of all suspects are convicted in Eastern and Central European countries, 44.6% in Northern and Western European countries, 35.7% in Southern European countries) (Harrendorf, 2017). In 2015, during the regional project "Resocialization of offenders in the European Union: strengthening the role of civil society", a study was conducted on "Alternative criminal sanctions in the European Union" (Graebseh, Burkhardt, 2015), which examined non-custodial measures to determine the most promising criminal sanctions alternatives. The authors of the study, discussing the experience of states using alternative measures to deprive of liberty and sentencing a person, singled out the exemption from criminal liability under surety applied in Lithuania as a good example of Lithuanian criminal justice.

The norm of Article 40 of the CC, adopted on 2000 September 26 with the new CC, establishes that a person who has committed a first-time criminal misdemeanor, negligent or light or premeditated intentional crime can be released from criminal liability under surety of a person worthy of the court's trust, if he has admitted his guilt for the committed criminal act, is sincerely sorry, at least partially compensated or eliminated the damage caused, and there is also reason to believe that he will fully compensate this damage and will not commit new criminal acts again. This type of exemption from criminal liability can be applied only if there is a written request from the guarantor.

Part 6, Article 227, Part 5, Article 259, Part 3 Article 291, paragraph 2, Article 291, paragraph 3 of the CC.

During the entire period of validity, this norm of criminal law was never changed or improved. There is also no comprehensive analysis of individual research studies on this institute. The general analysis of this type of exemption from criminal liability is presented only in educational sources: the commentary of the CC (Prapiestis *et al*., 2004, p. 253–261) and the book by Vytautas Piesliakas "Criminal Law of Lithuania. The second book" (Piesliakas, 2008, p. 374-376). Exemption from criminal liability under surety was examined in certain comparative aspects by Agnė Baranskaitė, who studied the release from criminal responsibility after the perpetrator reconciled with the victim (Baranskatė, 2005; Baranskaitė, 2007). This may imply several things: either the norm of Article 40 of the CC is perfect, or no one is interested. On the other hand, the statistics of the application of Article 40 of the CC justify that institute of surety for exemption from criminal liability is becoming more and more popular every year: in 2014 517 persons were released from criminal liability on bail, in 2015 – 632, in 2016 – 738, in 2017 – 1353, in 2018 – 1844, in 2019 – 1912, on 2020 – 1885, and in 2021 –2025.

Since 2017, the statistics of applications of a surety and the general increase in the awareness of this institute have had a lot of significance. On January 1 driving a vehicle while intoxicated was criminalized. Persons who have committed this criminal act are released from criminal liability under surety most often (on average 38% of all cases of a surety).

It can be said that in 2017 there was a fundamental turning point in all kinds of interest in a surety institute. Surety as a ground of exemption from criminal liability has been actively discussed in the public space. Public information tools and specialized legal news portals (for example, Teisė.Pro) have begun to explain to the public what exemption from criminal responsibility under surety is, how this measure differs from other types of exemption from criminal responsibility, etc. The review of the content of media reports conducted during the dissertation research revealed that the media when providing the public with information about decisions made to

release persons under surety, do not shy away from forming the headlines in a critical or even shocking style. For example, in the very first publication (January 12, 2017), which described the first case of a drunk driver prosecuted, the decision to release him from criminal liability under surety was reported to the public as follows: "A shameful loophole in the law: a drunk driver got away with it, and there will be thousands" (lrytas.lt, 2017). When describing cases of a surety, the biggest negative burden falls on the decision-making entity – the court and the very idea of exemption from criminal liability: "The disgrace of the courts: a Kaunas man who amassed huge amounts of child pornography escaped punishment" (Delfi.lt, 2021), implying the impression of a person's acquittal.

The exemption from criminal liability under surety has even attracted the attention of the Special Investigation Service of the Republic of Lithuania, which, in its anti-corruption assessment report No 4-01-6982 of 10 September 2018, stated that persons released from criminal liability could not be considered to be of impeccable reputation in the context of the specific laws of the Republic of Lithuania that lay down the requirement for the impeccable reputation to hold a certain office or engage in a certain activity. By Resolution No 13P-111-(7.1.2.) of the Judicial Council of 26 October 2018 "On the Approval of the Training Plan for the 2019 Judicial Training Programmes", the topic of exemption from criminal liability was integrated into the training program for district court judges hearing criminal cases, and on 24 October 2019 The Supreme Court of Lithuania (hereinafter referred to as the Supreme Court) published a review of the case law on the application of release from criminal liability under surety (Article 40 of the CC). In 2018, the law firm „Spectrum legis“ launched the website https://laidavimas.lt, where it started to promote the possibility to be released from criminal liability under surety and the preparation of the necessary documents for a standard price of EUR 899.

The public and legal interest in the institution of surety is therefore unquestionable. The increased application of Article 40 of

the CC and the application of this measure to the newly criminalized offense of drunk driving (Article 2811 of the CC) also contributes to the resolution of other issues of relevance to the General Part of the CC, such as the interpretation and application of measures of penal influence on persons released from criminal liability, and the development of the concept of exemption from criminal liability itself. However, the scientific problems of the topic under analysis, *inter alia*, stemming from the relevance of the topic, materialize in several dimensions.

First, the lack of research on surety as a ground for exemption from criminal liability means that the institution used frequently enough in practice has no doctrinal basis. The doctrine still does not contain a concept of surety bond in criminal law. It is not clear what is meant by surety of this kind and the release of the offender on this basis, as well as its relationship with surety in civil law, and what legal or other relations arise when a court decides to dismiss a person's criminal case based on Article 40 of the CC. This institution is unique in the CC system because it establishes the participation of a third party (unconnected with the offense) in criminal legal relations. The CC Commentary states that in such case, the person‘s liability is divided between three entities: the perpetrator, the guarantor, and the State, where the person is "transferred" to the guarantor's liability (Prapiestis et al., 2004, p. 254). However, what is meant by such a "division of responsibility", what is the division of responsibility in this case, and can it be divided at all? Does the guarantor have the legal personality to be recognized as a participant in a legal relationship? What are his/her subjective rights and obligations?

Second, the lack of science-based knowledge is filled by the Supreme Court's case-by-case jurisprudence on the interpretation and application of the law. Having established the doctrinal grounds for exemption from criminal liability under surety, it is necessary to assess whether the practice of interpretation and application of the law that has been developed so far is in line with the essence of such

an institute and whether the application of surety is based on the concept of exemption from criminal liability. In light of these questions, it is important to assess not only the work of the courts in the application of exemption from criminal liability but also the legal regulation of Article 40 of the CC itself and the compatibility of this regulation with the objectives of modern criminal law and the essential features of surety. On the other hand, the legal perception of surety (its application) is also changing as case law develops. This is reflected in the recent jurisprudence of the Supreme Court, where an extended panel of seven judges has recognized the possibility of exempting a legal person from criminal liability on the grounds of Article 40 of the CC (Supreme Court ruling in a criminal case, 10 November 2021), although in criminal law doctrine surety has never been classified as a form of exemption from criminal liability that could be applied to a legal person who has committed a criminal offense (for example, Soloveičikas, 2006, p. 125).

Thirdly, taking into account, *inter alia*, the fact that such a diversionary measure in criminal proceedings is not generally accepted in modern criminal law in any other foreign criminal law practice (only the Criminal Law of the Republic of Ukraine provides for a similar institute), in the context of balancing the public interest and the private interest, the question of the necessity of such an institute in Lithuania should be raised. In this respect, it is also relevant to assess the compatibility of the exemption from criminal liability under surety with the constitutional principle of the administration of justice, and whether the exemption from criminal liability under surety does not distort the balance between the principles of humanity and the inevitability of liability, which is necessary for the rule of law, and whether such a measure is not likely to create a mood of impunity in society. It is significant for this study that almost 70% of all criminal cases brought based on surety are concluded at the pre-trial stage (Article 212(6) of the Criminal procedure code of Lithuania (hereinafter – CPC). It is therefore important to assess whether the different stages of the application of

bail do not result in different standards for this institute, whether release from criminal liability during a pre-trial investigation can be justified and does not violate the presumption of innocence guaranteed to the individual, and whether such a process does not distort the constitutional *modus operandi* of the entities involved in the process.

1.2. RESEARCH OBJECT

The object of the research is defined by the title of the topic – the dissertation research analyses the exemption from criminal liability under surety of a person who has committed a criminal offense, as set out in Article 40 of the CC. This is the central object of this dissertation research, which determines that the work analyses the positivist legal establishment of surety as a legal phenomenon in Lithuanian criminal law. This means that this study analyses surety bond not only within the framework of Article 40 of the CC, but also in the broader context of surety as a criminal law institute (the CC, the CPC, and other related legal norms relating to the application, execution, and consequences of surety).

The study also focuses on the concept of exemption from criminal liability, the problematic issues of its formulation, the legal position of a person exempted from criminal liability and the possible legal restrictions, and the application of exemption from criminal liability under surety at different stages of the proceedings. After examining the social/legal genesis of a surety bond and identifying the concept of surety, it is examined to what extent this concept is in line with the established practice of applying Article 40 of the CC.

This thesis research is exclusively a study of the science of law, i.e. it is not interdisciplinary (between different social science disciplines). It should be noted that the breadth of the subject matter of the thesis research leaves room for the study of other social science disciplines such as criminology and sociology. And although the individual parts of the research make use of certain knowledge of

these sciences and analyze data and sources relevant to the research, the research is concentrated and the research methods are used exclusively for legal analysis.

Although the dissertation is largely a purely criminal legal study of the development of exemption from criminal liability under surety, its regulation by legal norms, its validity, objectives, and application (perception, interpretation, and coherence), however, the institute under scrutiny is unavoidably linked to different branches of law. On one hand, surety itself is well established in civil law as a way of ensuring the fulfillment of an obligation, while on the other hand, exemption from criminal liability as a way of ending a criminal legal relationship is procedural in nature (a form of termination of the criminal proceedings). Therefore, the topic under analysis and the research being carried out have the characteristics of an interdisciplinary (different branches of law) scientific analysis. The legal phenomenon of surety itself will be analyzed with the help of civil law knowledge. Meanwhile, issues related to criminal procedural law will be analyzed only to the extent that they are necessary to reveal the problems of the application of the exemption from criminal liability under surety as a material legal institution. This thesis does not seek to assess whether the institute of exemption from criminal liability itself is reasonably established in material criminal law, as such an analysis would go beyond the chosen subject since it concerns not only surety but the whole system of exemption from criminal liability.

The study also does not analyze issues of a purely procedural nature, such as the impact of a decision (*res judicata*) on the exemption from criminal liability under surety on the issue of the criminal liability of accomplices to a crime, or the evaluation of evidence. The study focuses on the third party's voluntary involvement in criminal legal relations. Consequently, legal instruments (national or international) which, although they involve the participation of third (private) persons in criminal legal relations resulting from the commission of a criminal offense, where their

participation is a legal consequence of a court decision, such as probation, guardianship of minors, are not relevant to the present study.

1.3. OBJECTIVES AND TASKS OF THE RESEARCH

The main objective of this thesis research is to comprehensively investigate and assess the legal establishment and overall regulation of the exemption from criminal liability under surety in the laws of the Republic of Lithuania, the practice of its application, to reveal the shortcomings of the legal regulation and practical application, and to propose possible solutions to these shortcomings. To achieve the stated objective, the study has the following tasks:

1) to provide an overview of the concept of surety, identifying the essential features of surety as a legal instrument;
2) having identified the features of surety, examine the legal institutionalization and manifestations of surety in Lithuanian criminal law sources;
3) to examine the issues related to the doctrinal and legal formulation of the concepts of criminal liability and exemption from criminal liability;
4) to analyze the conditions for exemption from criminal liability under surety, as laid down in Article 40 of the CC, from the point of view of the legal regulation and the practice of application of the law;
5) to identify and examine the legal personality of the surety and to assess that personality in the context of the general concept of surety;
6) to assess the problems of the application of the exemption from criminal liability under surety at different stages of criminal proceedings – trial and pre-trial – from both legal and practical aspects;
7) discuss the factors limiting the discretion of the judge in the context of the application of Article 40 of the CC, and assess the

relationship between the application of measures of criminal sanctions and the granting of surety bond;
8) in light of the results of the study, make proposals for the improvement of the existing legal framework and/or case law.

1.4. SCIENTIFIC NOVELTY OF THE RESEARCH,

The beginnings of surety for persons who have committed criminal offenses in Lithuania date back to the times of customary law, and in statutory law they were already established in the early sources of law – the Pamedes Code of Law, and later in the Statutes of the Grand Duchy of Lithuania. Despite centuries of practice in the use of sureties in criminal cases, this is the first time that scientific analysis has been carried out on this issue. This thesis is the first scientific work on surety in criminal law at this level. The comprehensive analysis of surety bond as a social and legal phenomenon adds to the knowledge of legal history scholarship on the relationship of certain institutes common in ancient legal proceedings to surety and their existence in contemporary social and, to a certain extent, legal relations, whether or not these relations are regulated by legal norms. The research has shown that the institute of surety (later transformed into the institution of compurgation or ritual oath), originated in the ancient criminal procedure and then existed for many centuries in both the common law and the continental law tradition (see, for more details, Pettingal, 1779; Makhovenko, 2007), corresponds to the essential features of surety in respect of the perpetrator of a criminal offense.

The doctoral research also seeks to find the connecting points between two relatively different branches of law – civil and criminal. Although surety undoubtedly dominates the legal relations governed by private law, which at first sight may only be related to Article 40 of the CC with a name, the results of the study show that the structure of surety remains the same irrespective of its legal form. It needs to be noted that surety is not a popular topic in the works of

Lithuanian private law scholars either, which is why this study can be considered not only as a completely new and interdisciplinary one, but the context of the formation of the phenomenon of surety, which is analyzed in the study, makes it possible to apply the results of the study to the interpretation of virtually any legal and social relationship arising from a surety bond. The comparative analysis of civil and criminal surety is particularly relevant to the analysis of the legal personality of the surety, its rights, and obligations.

This study examines surety as such from a completely new angle, never before explored in either Lithuanian or foreign legal scholarship – through the concept of the creation of a relationship of trust. Although manifestations of trust are common in law (Harding, 2009) and the aim of building trust is often found in the political and legislative spheres, legal scholars have not provided a clear answer to the question of the legal context of trust. The question of whether trust can be considered a legal principle is still not answered (Fichera, 2009). In general, scholars studying trust tend to conflate the phenomenon with law. For example, Fichera argues that "trust is not a legal term" (Fichera, 2009, p. 19), which is why trust is perceived as a social construct rather than as a defined legal principle, because the government, in its regulation of legal relations, does not leave room for the manifestation and development of voluntary cooperation. According to Taylor, the law encourages reliance on rules to regulate individual behavior (Taylor 1987, cited in Cross, 2001). The criticism of the law in this respect is based on the fact that it 'overwhelms' trust, as genuine trust becomes unnecessary, i.e. intrinsic motivation is replaced by extrinsic sanctions when the relationship is given a legal form (Putnam 2000). The analysis of surety in criminal law presented in this thesis adds to and extends the legal literature on the manifestation of trust in law (e.g. Sitkin, 1993, 1995; Cross, 2005) by distinguishing surety bond not only as a socio-legal institution based on trust but also as a legal relationship created by that trust.

The dissertation also takes a fresh look at relatively "old" issues of Lithuanian criminal law doctrine related to the interpretation of the concepts of criminal liability and exemption from criminal liability. Although the dissertation does not seek to present a different (not yet established) legal concept of criminal liability, it does, however, through the application of research methods, create a spatial model of the application of criminal legal relations as criminal liability, which explains not only the moments of commencement and the content of criminal liability, but also the legal status of the participants of the criminal legal relation, and the (chosen) notion of the exemption of criminal liability.

Finally, the thesis also examines other issues related to the topic under analysis, in particular, the compatibility of the imposition of measures of penal impact with the objectives of a surety bond, the existence of which is based on the creation of a relationship of trust between the state and the offender. Moreover, as already mentioned in the discussion of the research issues, this work pays considerable attention to the application of the exemption from criminal liability under surety at different stages of the proceedings, examining this issue in the context of the constitutional principles of the presumption of innocence and the administration of justice.

1.5. SOURCES OF THE RESEARCH

To achieve the aim and objectives of the dissertation, the sources collected, used, and analyzed during the research can be divided into several main categories:

Normative sources. The main source of the study is the CC and the legal regulation laid down therein, which is directly related to the topic under analysis – the system of exemption from criminal liability and its specific type – under surety, as well as issues directly arising from the topic under analysis (provisions on criminal liability, measures of penal impact, etc.). The historical legal regulation is also relevant to the study of the formation of the institution, as it relates to

the manifestations of surety in the earliest Lithuanian legal sources – the Code of Pamedė, the Statutes of the Grand Duchy of Lithuania, the inter-war criminal legal regulation (the Law on Provisional Sentencing, 1928), and, of particular relevance to the study of the institution is the CC of 1961, which was applied under the Soviet Occupation, as the foundation for the current concept of the exemption from criminal liability under surety. In assessing the application of Article 40 of the CC, the main normative source examined is the CCP. One of the most important sources is the Constitution, whose fundamental ideas and norms are the basis for the subject under consideration.

To analyze individual issues relevant to the study, the regulation of special laws of the Republic of Lithuania is analyzed and evaluated, for example, the Law on Courts, the Law on the Civil Service, the Law on the Bar Association, the Law on Bailiffs, the Law on the Notariat, the Law on the Control of Weapons and Ammunition, etc.

This group of sources also includes the criminal laws of foreign countries analyzed in the study. The most important here is probably the Criminal Code of the Republic of Ukraine since an examination of the CC of European countries shows that only this country has introduced in its criminal law the possibility of releasing the perpetrator from criminal liability under surety. On the other hand, in foreign practice, sureties are often used not as a ground for the termination of proceedings (diversion), but as a precautionary measure to be used in conjunction with bail. Therefore, the comparative study on bail in criminal law is based on the criminal (criminal procedure) laws or regulations of the USA, Canada, Germany, the Netherlands, Russia, and other countries in South-Eastern Europe (the Balkans), and Central Asia.

Specified literature. When discussing the relevance of the topic, it was noted that there are no separate scientific studies on the topic of exemption from criminal liability under surety in Lithuania. Therefore, this category of sources can be divided into several

groups, depending on their relation to the research being conducted. The first group of sources includes those works which directly analyze/debate the issue of surety. In Lithuania, the most comprehensive review of Article 40 of the CC in Lithuania to date is presented in the Commentary on the CC (Prapiestis *et al*., 2004, p. 253-261) and in Vytautas Piesliakas' book „Lithuanian Criminal Law. The second book" (Piesliakas, 2008, pp. 374-376). Insights relevant to the topic under analysis are also provided in the monograph on the challenges of the integrity of the General Part of the CC and the challenges of (re) harmonization of innovations, published by the team of authors of the Faculty of Law of Vilnius University (Švedas G. *et al*., 2017). From a comparative perspective, this group also includes the analysis of a fairly similar institute in Ukraine (Gumenyuk, 2012), which, *inter alia*, helped to establish why the institute of exemption from criminal liability under surety is not accepted in the criminal law practice of foreign countries. In this group of sources, the works of criminal law authors who described the exemption from criminal liability under surety, which was applied in the Soviet era, are also relevant (Klimka and Apanavičius, 1972; Bieliūnas *et al*. 1989).

The second group includes sources analyzing the theoretical and practical issues of criminal liability and exemption from criminal liability (its institutes) from the aspects of material criminal law and procedure. The most significant scientific work in this field has been carried out by Agnė Baranskaitė, who in 2005 defended her dissertation on the exemption from criminal liability after the perpetrator has reconciled with the victim (Article 38 of the CC) (Baranskaitė, 2005), and later, based on dissertation published the monograph "The Treaty of Peace in the Criminal Law" (Baranskaitė, 2007). This scholar has devoted a lot of attention to the general analysis of exemption from criminal liability, as well as to the assessment of this institution in the context of constitutional and criminal law principles, the reconciliation of public and private interests (Baranskaitė, 2003; Baranskaitė, 2009; Baranskaitė and

Prapiestis, 2006), and to the procedural issues of exemption from criminal liability (Baranskaitė, 2008). Relevant scientific publications dealing with certain aspects of exemption from criminal liability have also been published by Iveta Vitkutė-Zvezdinienė, who has analyzed the institute of a minor offense Vitkutė-Zvezdinienė, 2006; Vitkutė-Zvezdinienė, 2007; Vitkutė-Zvezdinienė, 2009), Rima Ažubalytė, who has studied the discretionary criminal procedure and its relation to exemption from criminal liability from various legal aspects (Ažubalytė, 2006; Ažubalytė, 2008), Vytautas Piesliakas, who has analyzed the theoretical and practical problems of the exemption from criminal responsibility (Piesliakas, 1979), the Russian scientist V. Sverchkov (2008). This group of research sources, depending on the object of the research, also includes scientific publications analyzing general issues of the content, application, and scope of criminal liability. These issues have been mainly addressed by Romualdas Drakšas (2003; Drakšas 2004; Drakšas, 2008), Vytautas Piesliakas (Piesliakas, 2007; Piesliakas, 2009), as well as by the authors of textbooks on criminal law (Abramavičius et al., 2001; Švedas, G. *et al.*, 2019). This also includes scholarly sources that, although indirectly, have dealt in one or another aspect with issues and institutes of substantive and procedural criminal law relevant to this study (e.g., objectives of modern criminal law, alternative solutions to criminal liability, application of legal consequences to perpetrators of criminal offenses, etc.). The research has drawn extensively on the scientific publications of Gintaras Švedas and Jonas Prapiestis (Prapiestis, 2002; Švedas, G., 2006; Prapiestis and Švedas, G., 2011; Švedas, G., 2014), on the works of other Lithuanian and foreign criminal law scholars (Sakalauskas, 2000, 2010, 2012; Šulija, 2001; Justickis, 2001; Kietytė *et al.* 2006; Goda *et al*, 2011; Goda, 2012; Rimšelis, 2005; Nevera, 2006; Merkevičius, 2008; Randakevičienė, 2009; Fedosiuk, 2012, 2014; Levon, 2013, 2015; Bikelis, 2014; Michailovič *et al.* 2014; Gladkikh and Kurcheyev, 2015; Garbatavičiūtė, 2018, 2020; Tak, 2008; Sundurov, 2012; Kruglikov,

2014; Harrendorf, 2017; Monoghan, 2020; Willems, 2021; Simester, 2021, and so on.)

The third group of sources relevant to the study consists of academic works on the analysis of surety as a legal institute. Due to the civil nature of surety, the majority of scholarly work on surety has been carried out by scholars in this branch of law. Given that the modern concept of a surety bond as a means of guaranteeing the performance of an obligation has changed little since Roman Law, the analysis of surety is contained in the sources which deal with the legal institutes which originated and developed in Roman Law. Notable examples include the books Roman Law (Nekrošius et al. 2007) and Roman Private Law (Jonaitis, 2014), Roman law textbooks and publications published by the Universities of Cambridge and Oxford (Stain, 2012; Johnston, 2015; Du Plessis, *et al.*, 2016), and an article by W. H. Loyd (Loyd, 1917). For an analysis of the institute of surety in the CC, see the Commentary to the Sixth Book of the CC (Mikelėnas, et al. 2003). When investigating the manifestation of surety in criminal law, sociological studies conducted in Canada, which assessed the use of surety as a custodial measure, the characteristics of sureties, and their legal duties and responsibilities, were particularly useful for this study (Myers, 2009; Schumann, 2018), while the historical background of the formation of the institute and the comparison of the ancient institutes used in court proceedings with surety for offenders were particularly significant in the research works of Jevgenyj Machovenko (Machovenko 2004, 2007, 2013).

One of the main angles of the analysis of surety bond as a socio-legal phenomenon in this thesis is the relationship of trust created by this institute. Trust is not yet a clear-cut or widely studied category in legal scholarship (e.g. Cross, 2005; Willems, 2021). For this reason, the thesis analyses the work of other social sciences (philosophy, political science, sociology) that have investigated trust as a phenomenon (Gambetta, 1988; Jones, 1996; Braithwaite and Levi

1998; Putnam, 2000; Cook, 2001; Hoffman, 2002; Harding, 2009; etc.).

Case law. The dissertation study analyses the Supreme Court's case law on the interpretation and application of the provisions of Article 40 of the Criminal Code in cases of exemption from criminal liability under surety, which has been developed between 2007 and 1 January 2022. It is one of the most important sources of this study, which reveals the established jurisprudential approach to the institute under study. It is this approach that fills the gap in doctrinal knowledge and provides guidelines for the application of Article 40 of the CC for lower courts. Therefore, the study analyses how these positions are consistent with the established conceptual foundations of a surety bond as a phenomenon, by assessing the positions developed in specific cases and other judicial sources (reviews, resolutions of the Supreme Court Senate). Although the study mainly focuses on the procedural decisions of the Supreme Court, examples of the practice of lower courts (district, regional) are also provided to illustrate certain practical situations. The study evaluated over 550 decisions rendered by courts of the first instance and appeals in cases of exemption from criminal liability. However, these decisions were assessed in the context of the collection of specific data relevant to the investigation, relating to the granting of bail and measures of penal impact. The Constitutional Court's and the ECtHR's decisions are also relevant for analyzing individual issues.

The practice of settlement (closure) of pre-trial investigation cases is a separate source within this group. Although this category of cases is not as public as court cases, the study needed to assess the case law on Article 40 of the CC at this stage of the proceedings. The author of the study had access to 95 case files of pre-trial investigations concluded by releasing the suspect from criminal liability under surety (Article 212(6) of the CCP).

Other sources. This category of sources includes all sources that cannot be classified as previous sources but are relevant to the analysis and conclusions of the study. In particular, the *travaux*

preparatoires of this law should be analyzed to examine the background to the introduction of surety into the CC. The study included an assessment of the draft Criminal Code of the Republic of Lithuania No. P-2143 and the alternative version of this draft No. P-2143A, as well as an examination of the materials of the discussion of these drafts in the Seimas of the Republic of Lithuania (the materials of the Committee on Legal and Law and Order, the proceedings of the plenary sessions, and the verbatim transcripts of the plenary meetings).

Comparative studies conducted by NGOs or international organizations are relevant for the analysis of the international practice of alternative measures to the traditional judicial process (e.g. Fair Trials, 2017; Jovanovič and Stanisavljevič, 2013). At the national level, the annual reports on the activities of the courts and judicial self-government institutions published by the National Judicial Administration (2021, 2020, 2019) are relevant.

During the dissertation research, more than 3 500 media reports related to the decisions taken to release a criminal offender from criminal liability under surety were evaluated to assess (1) the situations related to the initiation of criminal proceedings and their impact on the social position (reputation) of the person; (2) the public opinion formed on the decisions to release a person based on Article 40 of the CC; (3) the possible impact on the judge's discretion not to apply Article 40 of the CC in certain categories of cases. Finally, this group of sources also includes the web portal https://laidavimas.lt and the information it provides specifically on surety.

1.6. RESEARCH METHODS

The research was carried out using the methods of scientific research common in criminal law, the most important of which are historical, linguistic, systematic analysis, comparative and empirical methods of expert questioning.

Although historical and linguistic approaches are often used in similar types of research, this study gives these research methods a high profile. This means that the methods are not used to provide an isolated overview of the historical genesis of the institute under study or to provide definitions of terms relevant to the research. These methods are used in the thesis as an integrated logical chain of the thesis and its conclusions and/or generalizations. The historical and linguistic methods are used to support the two main poles of this research, namely surety itself and the institute of exemption from criminal liability. The historical method (together with the comparative method) is particularly important in the formulation of the concept of surety and the identification of its essential features, in particular the sureties. The linguistic method has been used to formulate the concept of exemption from criminal liability. Linguistic theories are used to analyze the concept of exemption from criminal liability through the meaning of the constitutional concept of "brought to criminal liability", creating a spatial model of criminal legal relations, which explains the legal starting and ending points of prosecution.

The systematic analysis method was used to analyze scientific literature, legislation, and case law. This method was used to reveal the meaning of the content of the conditions and grounds for exemption from criminal liability under surety laid down in the Criminal Law and was also used to summarise the results of the study, draw conclusions and make proposals.

The comparative method was used to compare existing and expired legal regulations, draft legal acts, different doctrinal positions, and relevant provisions of civil and criminal law. The application of this method also allowed us to reveal the differences between the relevant provisions of the criminal laws of Lithuania and other countries, assess their similarities, and show how one or another issue relevant to the study is regulated in other countries.

During the research, an empirical survey of the expert evaluation was carried out, in which eminent Lithuanian criminal law scholars

(14 legal scholars with an average of 15 years of legal and scientific work experience), representing different Lithuanian law schools and practicing different legal professions (judges, attorneys, and prosecutors), gave their opinions on the reasons for the introduction of the exemption from criminal liability under surety in the Criminal Code and the compatibility of the application of this institute with the principles of the presumption of innocence and the administration of justice.

1.7. THEORETICAL AND PRACTICAL IMPORTANCE OF THE RESEARCH

The individual parts of this dissertation research, on the one hand, add a new angle of approach to the knowledge of the Lithuanian criminal law doctrine about the criminal law institutes that have been analyzed several times (e.g., criminal liability, exemption from criminal liability), on the other hand, they provide a basis for further research on similar topics (e.g., the institute of limitation of time and the exemptions from criminal liability in the cases provided for by the Special Part of the CC). The concept of the manifestation of the relationship of trust in criminal law presented in the dissertation allows for a deeper study of both national and international criminal law institutions (cooperation between States in criminal matters, suspension of sentences, parole, etc.) in this respect.

The analysis of the provisions of Article 40 of the CC and the conclusions drawn in the dissertation would undoubtedly be of practical significance for the resolution of criminal cases of this kind if the results of the research were accepted in case law. In such a case, the application of the surety could be subject to substantial changes, in particular as regards the assessment of the suitability of the guarantor and the granting of surety. Furthermore, the results of the study could lead to changes in the practice of applying Article 40 CC for specific offenses, including the imposition of measures of

penal impact, as well as the application of Article 40 CC during the pre-trial investigation stage.

1.8. STRUCTURE OF THE DISSERTATION

The structure of the dissertation is in line with the subject of the research and is consistent with the objectives of the research. The dissertation consists of an Introduction, which defines and discusses the relevance of the research, the object, the goal, the objectives, the sources of the research, the scientific novelty of the work, the theoretical and practical significance of the work, the research methods, the approval of the research results and the structure of the work, the dissertation's defensible statements; the exploratory-conceptual part, in which the subject and object of the research are analyzed in detail to achieve the intended aim of the research; the discussion part of the research results, in which the conclusions and suggestions of the dissertation are presented; the list of literature sources used in the preparation of the dissertation and the list of the author's scientific publications on the subject of the dissertation.

The research and theoretical part of the dissertation consists of four parts, which in turn consist of chapters and sub-chapters, and summaries of the parts.

The first part of the dissertation analyses a surety bond as a socio-legal institution, its main features, and its application in Lithuania in different historical periods.

The second part examines the institute of surety as a type of exemption from criminal liability, i.e. it examines the problems of the formulation of the concepts of criminal liability and exemption from criminal liability, which is crucial for the analysis of the whole study. This part assesses whether exemption from criminal liability is an integral part of the implementation of criminal liability, examines the compatibility of this institute with other CC institutes, and establishes and defines the starting point of the study – the spatial criminal legal relations in the context of the concept of criminal

liability. The chapter also assesses the meaning of the term “having committed an offense“ in criminal law and considers whether this provision of the law precludes the application of exemption from criminal liability as a discretionary way of concluding criminal proceedings without a substantive trial.

The third part of the study assesses the positivist view of surety as enshrined in Article 40 of the CC. It examines the conditions and grounds for this institution and focuses on the special participant in criminal legal relations, the guarantor, his legal personality, and his liability, which is only provided for in this article of the CC.

The fourth part of the study focuses on the practical application of surety. This part looks at the application of the law through the discretion of the judge to decide whether to release the offender from criminal liability under surety and the factors limiting this discretion. It also assesses the compatibility of the imposition of penal measures with the objectives for which the person was released from criminal liability based on Article 40 CC. Finally, this chapter looks at the end of the surety bond.

The study concludes with the main conclusions and suggestions.

1.9. STATEMENTS TO BE DEFENDED

1. A person exempted from criminal liability shall not be considered to be criminally liable, and the grounds for criminal liability shall be assessed prima facie when deciding on the exemption from criminal liability.
2. In their practice, the Lithuanian courts do not apply the essential characteristic of the legal relationship of surety bond, i.e. the liability of the surety, which prevents the true purposes of this institute to be reached, and the release of a person from criminal liability on this basis becomes formal.
3. The application of Article 40 of the CC during the trial and the pre-trial investigation differs substantially. The established practice of discontinuing pre-trial investigations is fundamentally

inconsistent with the prerequisites for the application of Article 40 of the CC and is incompatible with the imperatives of the constitutional principle of the administration of justice.

4. The application of Article 40 of the CC is to a large extent formalized, in the case of certain offenses provided for in Article 259 CC and Article 281[1] CC), mechanical. As a result, it does not maintain a proper balance between the value objectives pursued by this institute and the inevitability of criminal liability, may which lead to the perception that the committing of certain acts is not subject to criminal liability, and may create the preconditions for treating Article 40 of the CC as an effective defensive measure to unduly alleviate the legal situation of the perpetrators of criminal offenses.

1.10. SUMMARIES OF THE RESULTS OF THE RESEARCH

Summary of the results of Part One

It is probably impossible to answer the question of when the institution of assuming liability for another person – surety – came into social relations. What is certain is that the legal institutionalization of such relationships took place in the context of the development of legal thought, as embodied in the Roman legal system. Surety in private relations has evolved from a person chained in a dungeon to an instrument widely used in global business and legal relations, whereby, to protect the interests of the creditor, the debtor's obligation is 'divided' between him and a third party. However, civil law cannot monopolize surety because it is primarily a social, not a legal, phenomenon. Because of its nature, surety has also developed, in various forms and at different times, in the field of criminal law.

The analysis of the legal manifestations of surety makes it clear that it is based on a relationship of trust. Trust as a phenomenon (value) has been the subject of extensive analysis in the works of various social sciences since the beginning of the 20th century. Most

of the scholars who have analyzed trust have tended to conflate law with trust. However, the evolving legal doctrine in particular areas is exploding these myths. The scholarly analysis carried out allows us to further strengthen the position of the law-trust communion approach. Surety (irrespective of the legal or social sphere in which it arises) is a special tool for creating a relationship of trust. The mere decision to provide a gratuitous guarantee for another person (his or her obligations) and to assume personal responsibility is rooted in a common human relationship of trust, but more importantly, such a sometimes perhaps altruistic act creates a relationship of trust between the two main actors in the relationship in question, the decision-maker and the one for whom the decision is made. The relationship of trust created by the act of surety is in line with the qualifying features of the relationship of trust that have been refined in the social sciences, the essence of which is a broader range of possible decisions, which allow for certain legal concessions.

The legal relationship of a surety bond is always accessorial – secondary to the main relationship or obligation. A surety is inseparable from the personal liability of the surety, but a distinction can be made between passive and active forms of surety, where the distinction is based on the relationship between the surety and the person for whom it has given surety and the obligations arising from it. A civil surety is passive, while examples of surety in criminal law confirm the existence of an active model of surety, where the surety, by becoming a participant in the legal relationship, assumes certain additional duties (e.g. monitoring, supervision, influence). The active form of surety used in Lithuania was adopted from Soviet criminal law.

Summary of the results of Part Two

The development of the concept of exemption from criminal liability is inevitably linked to the perception of criminal liability itself.

The formulation of the concept of criminal responsibility is a challenge that doctrine does not solve by providing a single and

universally accepted answer. However, some answers are accepted as more or less correct, i.e. the predominance/acceptance of a particular concept at the practical level determines how issues relating to the individual are dealt with, beyond the application of criminal liability alone. The concept of criminal liability is usually constructed based on four elements: the nature of the legal measures, the timing of their application, the subjects (their status), and the requirements of the presumption of innocence. The basis of the formula for the concept is the criminal-legal relationship. However, the doctrine has begun to take the view that the concept of criminal liability includes exemption from criminal liability, and that exemption from criminal liability itself implies the realization of liability.

The dissertation research, applying systematic and linguistic approaches, and drawing on theories recognized in linguistics, identifies the temporal application of criminal liability in terms of spatial metaphor of criminal legal relations, conceiving of criminal liability as a space towards which the main subjects of the criminal relationship – the state and the perpetrator of the criminal offense – move. The threshold across which the perpetrator is considered to be 'prosecuted', i.e. brought into the space of criminal responsibility and its application is the public condemnation of the perpetrator on behalf of the State, expressed in the words 'found guilty‘.

Exemption from criminal liability is the cessation of a criminal legal relationship (criminal proceedings) until a person is convicted, i.e. 'found guilty‘. This model is in line with the discretionary mechanisms of termination of criminal proceedings widely used in Western practice. In foreign countries, such diversionary mechanisms are mostly procedural in nature. Lithuania, having adopted the Soviet-era institute of exemption from criminal liability, has retained it in material criminal law. For this reason, the doctrine discusses the possibility of applying such a material law institute, which applies only to a person who has "committed" a criminal offense, until the moment of the examination of the merits of the case. The changing legal paradigm of criminal law relations and the

resolution of criminal conflicts justifies the various measures of the State's response to the commission of crimes, which inevitably entail a diversification of the classical investigative criminal procedure and the determination of material truth. The ECHR does not prohibit a person from waiving his or her right to a trial and from having criminal matters dealt with in a summary manner. Potential contradictions to the presumption of innocence are also addressed by correct wording in the judgments. The ECHR also does not prohibit a *prima facie* assessment of the validity of the charges against a person and of the qualification of the elements of the offense, without a final decision on the person's conviction. Therefore, it is not the exemption from criminal liability itself that is incompatible with the requirements of the presumption of innocence, but rather the doctrinal and legislative interpretation of the exemption from criminal liability, because it establishes all the elements of the offense charged, implies the condemnation of the person and the application of his criminal liability.

Exemption from criminal liability is a transaction between the two main actors in the criminal legal relationship – the state and the person suspected of committing the offense – to bring an end to that relationship. The State is the stronger party to the relationship, determining when and under what conditions the relationship begins, and is obliged to prosecute everyone who commits a crime. The State, by regulating criminal legal relations *in corpore* (both material and procedural), also says under what conditions the other party to the relationship, who could potentially be prosecuted, can avoid it, i.e. resolve the issue of his liability in another way that would have less legal consequences for that party. Thus, exemption from criminal liability can be seen as a refusal to prosecute and punish the guilty party. By applying this institution and by discontinuing the criminal proceedings against the perpetrator, the court believes that justice in the particular case and the preventive aim of criminal law will be achieved without condemning the perpetrator, without imposing a penalty, and without leading to a criminal record.

A deal between the State and a person to end a criminal legal relationship by way of exemption from criminal liability means that (1) the State has sufficient evidence to convict the person; (2) the decision is beneficial to both the State (in terms of time and costs) and the person (less severe legal consequences); (3) the subject to criminal liability avoids all the elements that make up the content of criminal liability: public condemnation by way of a guilty verdict, the imposition of a sentence, the serving of the penalty (the application of the sanction), and the conviction. Exemption from criminal liability may imply a complete exemption from liability, or the person may be subject to alternative sanctions or obligations, but this is left to the individual case.

Summary of the results of Part Three

The cumulative conditions for exemption from criminal liability under surety, as laid down in the Criminal Law, are necessary preconditions for a decision on the termination of the criminal legal relationship. The analysis of the case law has revealed how these conditions are applied and interpreted by the Lithuanian courts in a given case. It is this source that has also shown the approach of the courts to the institute of exemption from criminal liability under surety and its concept, substantiating the problem of the lack of doctrinal knowledge about the institution of surety in criminal law.

The Supreme Court's case law on the application of Article 40 of CC is not fully consistent in all cases. It can be concluded that the conditions of a "first-time offender who has committed a misdemeanor, a reckless offense or a petty or a minor offense" (Article 40(1)(1) of the CC) and "there are reasonable grounds for believing that he or she will make full reparation or make good the damage caused, will comply with the law and will not commit further offenses" (Article 40(1)(4) of the CC) are the least difficult conditions to be applied by the case law. The interpretation of the condition in Article 40(1)(3) of the CC, which requires the offender to make at least partial reparation or compensation for the damage, or

to undertake to compensate for this damage in the future, can be considered as the most inconsistent one in the case-law. The case law of the Court of Cassation does not allow reasonable conclusions to be drawn as to how much, when, and how the perpetrator of the offense should have made reparation for the damage caused by his or her offense, to be able to expect that the court hearing the case will be able to find that this condition has been fulfilled and to release the perpetrator from criminal liability under surety if the other mandatory conditions exist.

In a general sense, it should be noted that the Supreme Court has tended to interpret the conditions for the application of Article 40 of CC in a way that is more restrictive and less favorable to the perpetrator. This is best reflected not only in the *de facto* denial of the alternative to Article 40(1)(3) of the CC, namely the obligation to compensate for the damage, but also in the case-law requirements for the surety to prove the reality of its future positive influence on the perpetrator, and the general exaggeration of the surety's role in this legal relationship, which is inconsistent with the objectives of modern criminal law and the very idea of the institute. Moreover, the case law has, in individual cases, interpreted the conditions laid down in Article 40 of the CC in a broader way, by requiring conduct on the part of the perpetrator and the surety which is not expressly provided for by the law.

However, the most significant emphasis in the context of the analysis should be placed on the approach which is the starting point of the whole question of exemption from criminal liability, i.e. that exemption from criminal liability under surety bond implies an obligation of the surety to re-educate the perpetrator of the criminal offense. Such a provision is not in line with the modern paradigm of criminal law, social peace, and the aim of re-socialization of the individual. Most importantly, it not only directly contradicts the general concept of exemption from criminal liability but also creates contradictions within the framework of surety: relying on the person that he won‘t commit new criminal offenses, it is concluded that he

or she needs some kind of education because of his or her immature personality which is not independent and has not developed a system of values for life. In cases of exemption from criminal liability under surety, the courts tend to focus on the surety himself/herself and not on the main subject of the "peace agreement", the perpetrator.

By setting high standards for the application of surety, the case law negates the very essence of a surety bond as a social, and in particular, a legal relationship, since it does not, apply the inherent feature of surety – the surety's liability, i.e. the bail. The approach to surety which has been developed in the case of law completely excludes this institution from the whole system of exemption from criminal liability, making it more akin to the institution of suspension of sentence or even a form of custodial punishment.

On the other hand, this is not only the result of case law. The criminal law itself distinguishes surety from other forms of exemption from criminal liability by imposing conditions that are essentially analogous to and in some cases higher than, other forms of exemption from criminal liability set out in Chapter VI of the CC, and which require the offender to remain under the supervision of a third person for a certain period. No control or supervision mechanisms are established under the CC for persons who have otherwise been exempted from criminal liability for the offense committed.

Following the general concept of a surety bond as an instrument creating a special relationship of trust, following the practice of other countries, and the understanding of surety as a means of safeguarding the interests of the State, based on the surety's duty to observe the offender and to positively influence the offender by personal example and authority, and on the assumption of clear responsibility for the failure to comply with such duties, lead to a modification of the conditions for the application of Article 40 of the CC. For example, the requirement of Article 40(1)(3) of the CC relating to compensation for damages could be dispensed with altogether, as this condition can be fulfilled by sincere remorse for

the offense under Article 40(1)(2). To implement the essential feature of the surety, namely the liability of the surety, it is appropriate to revise the legal framework relating to the granting of a surety bond and to implement the liability of the surety not through the mechanism of a bond, but the surety's undertaking to pay a certain amount of money if the offender fails to justify the trust shown in him or her during the period of the bond and commits a new criminal offense.

Summary of the results of Part Four

The discretionary nature of the exemption from criminal liability is both a possibility for the application and a problem for this institute. The law provides for a wide range of discretionary decisions in the case of a surety, allowing each judge to decide freely on several issues relevant to each case. In other words, the judge's discretion in the context of surety is like a tool that creates a relationship of trust that is unique in criminal law. However, the value-laden origins of the institution, and thus the judge's ability to express or not express confidence in the offender, have been *de facto* overturned by the factor that most restricts the judge's discretion: case law, which has begun to "homogenize" all surety decisions. As a result, in every case in which the possibility of applying for surety arises, there is a tendency toward more standardized and uniform rules based on which the issues relating to the application/non-application of surety should be decided.

These "success" rules for the application of surety, which have been established in case law, are also known to legal service providers, who take care of the preparation of all the documents related to the application of surety. The vast majority of surety applications are dealt with by the courts in private, based on the written file only, without direct knowledge of the persons with whom they are supposed to establish a relationship of trust. The judicial practice has completely formalized the use of surety, including by taking the constitutionally unjustified role of a secondary decision-

maker, and by relegating the main issue of the availability of surety and the imposition of sanctions to the prosecutors. The virtually indiscriminate use of surety for a single offense (drunk driving) creates a climate of impunity in society, which the courts are attempting to remedy by imposing a set of measures that effectively amount to a conviction and a sentence. This casts doubt on the fact that the person has been exempted from criminal liability, and is in direct conflict with the aims and motives of the court in determining the possibility of surety in the case.

The results of the study reveal fundamental differences between the application of exemption from criminal liability at trial and the pre-trial investigation stages. The high standards for the application of Article 40 of the CC, which has been established by case law, do not in principle apply to the application of surety during pre-trial proceedings, where the vast majority of such decisions are taken. This practice has led to a departure from the nature of the surety bond, and the desire to deal with the matter fairly and reasonably has been overshadowed by the desire to deal with the matter as expeditiously and simply as possible.

Since the adoption of the CPC, Lithuanian criminal procedure law has not yet properly regulated the implementation of the provisions of Article 40 of the CC regarding the formalization of the decision to grant surety during the pre-trial investigation, the revocation of the decision on the application of surety, and the right of the surety to refuse to provide surety any longer.

1.11.CONCLUSIONS

1. Surety is the act of a third person's willingness to enter into a specific legal relationship, whether created or emerging, between two other entities, whereby a surety guarantees to one (decision-making) entity the conduct or performance of the other entity, promising to be liable in a personal capacity if the person guaranteed fails to fulfill his or her obligations. This legal

institution is based on a particular social value: trust. Surety bond as a legal and social institution fulfills the basic and so far well-known features of a relationship of trust. The personal trust expressed by the guarantor in a person, together with the assumption of personal liability for that person, creates a relationship of trust between the decision-maker (the creditor, the court, another person) and the person for whom the decision is taken.

2. In criminal law, surety is based on a third party entering into a legal relationship arising from the commission of a criminal offense, guaranteeing the personal qualities and future conduct, thereby facilitating the legal position of the person held criminally liable (the outcome of liability). The beginnings of this phenomenon can be found in early Lithuanian legal sources, but surety as a type of exemption from criminal liability was eventually shaped by Soviet criminal law. While no similar institution (termination of criminal proceedings on surety) exists in European criminal law, Article 40 of the CC corresponds to the established paradigm of modern Western European liberal criminal law, *inter alia*, based on the diversion of the proceedings, whereby the perpetrator of the offense is not put on trial and is not sentenced to a penalty.
3. The possibility for the offender to be exempted from criminal liability, enshrined in Article 40 of the CC, is in line with the principle of opportunity in criminal proceedings and the principles of humanism and chance recognized in criminal law. Exemption from criminal liability means the end of the legal relationship between the State and the perpetrator of the offense. A person who has been exempted from criminal liability cannot be held criminally liable, since none of the elements that constitute the content of criminal liability is realized on him. Exemption from criminal liability always takes place before a person has been convicted, i.e. publicly condemned by the State on behalf of the State as guilty. This means that such a person

does not cross the "threshold" of criminal liability and cannot be held criminally liable. The conclusion that a person has committed a criminal offense is reached by establishing *prima facie* that the act committed by him or her fulfills all the objective and subjective elements of *corpus delicti*, irrespective of the procedural stage at which such a decision is taken. The consent of the person prosecuted is an essential prerequisite for the application of such a procedure.

4. The conditions for the application of this instrument, as set out in Article 40 of the CC, are consistent with the objectives pursued. From a legal point of view, the conditions for release from criminal liability on recognizance are the most stringent compared to other types of release from criminal liability. Nevertheless, there is a tendency in case law to make these conditions even more stringent by introducing additional circumstances not provided for in law. The additional severity of the conditions for exemption from criminal liability is also reflected in the fact that surety as a method of exemption from criminal liability in Lithuanian criminal law is based on the model of an active surety.
5. The legal relationship of a surety bond is always accessorial. A surety is inseparable from the personal liability of the surety, but a distinction can be made between passive and active forms of surety, where the basis for the distinction is the relationship between the surety and the person for whom it has given the surety and the obligations arising from the surety. In the case of a passive surety, the relationship between the surety and the decision-maker does not qualify as a relationship of trust. A fully active surety model (where the surety must re-educate or otherwise influence the offender) is incompatible with the objectives and legal nature of exemption from criminal liability. It follows from the general concept of a surety bond as a relationship of trust where surety establishes a relationship of trust between the court and the offender, guaranteeing the

fulfillment of the condition laid down in Article 40(2)(4) of the CC and the confirmation of the court's conviction. Therefore, the guarantor cannot be placed under a *de facto* obligation to fulfill the special function of the penalty, since (1) the fact that the person is released from criminal liability establishes that there is no need to fulfill this and other purposes of the penalty; and (2) there is no legal justification for the imposition of this obligation.

6. The person who has been found by the court to be a suitable surety of the perpetrator fulfills the characteristics of a legal relationship subject. The general concept of surety requires surety to be based on a defined and personal liability of the surety, which is not generally applied by the Lithuanian courts. By the concept of surety bond, which is well established in private law, in the case of exemption from criminal liability under surety, a surety is to be understood not as a transfer of the perpetrator to the surety for re-education, but as a guarantee of the interests of the State using surety‘s liability. A surety based on such responsibility would have implications both for the conduct of the guarantor and for the perpetrator himself.
7. The application of Article 40 of the CC almost always results in the imposition of measures of penal influence provided for in the CC. By imposing these measures on persons released from criminal liability under surety, the courts not only pursue the objectives of punishment but also justify the criminalization of certain acts. In one single act of application of the law, the court, therefore, takes two fundamentally different and contradictory decisions: in one single decision, the court decides both to trust the offender and to distrust him. A decision to trust a person cannot be followed by a decision not to trust him. The imposition of measures of penal influence is a discretionary decision of the court, as is surety itself. However, this discretion is most constrained by the 'established' and 'settled' case law practise of higher courts, and may also be influenced by the formation of

public opinion and by the incentive of the decision to grant surety to avoid creating a mood of impunity in society.

8. The application of surety during a trial and in a pre-trial investigation differs substantially. At trial, the courts are obliged to establish all the conditions of Article 40 of the CC thoroughly and exhaustively, directly assessing the person's suitability to be the surety. Most of the decisions on the application of Article 40 of the CC are taken during the pre-trial investigation. The courts have followed the practice of granting surety at this stage without organizing a hearing. The vast majority of pre-trial investigations discontinued based on Article 212(6) of the CPC are formalized by a judicial decision not provided for in the CPC – a resolution. This means that in such proceedings, the decision to release a person from criminal liability under surety (assessment of the conditions thereof) is taken by the prosecutor and the issue of imposing measures of criminal liability is *de facto* resolved by the prosecutor. This disregards the constitutional principle of justice administered only by the court and distorts the *modus operandi* of the judiciary. One of the reasons for this phenomenon is court practice that has essentially established a pattern of "success" for the application of Article 40 of the CC, which is well known to those who provide legal services. A unilateral assessment of the written record does not allow a relationship of trust to be established and a decision to exempt a person from criminal liability under surety to be taken under the constitutional principle of justice.

1.12. PROPOSALS

1. In light of the results of the dissertation research, to align the legal regulation and application of the exemption from criminal liability under surety with the legal nature and objectives of this institute, it is proposed to amend the wording of Article 40 of the

CC "Exemption from Criminal Liability under Surety" and to word it as follows:

„1. A person who commits a misdemeanor, a negligent crime, or a minor or less serious intentional crime **for the first** may be released by a court from criminal liability **if** ~~subject to a request by~~ a person worthy of a court's trust **grants for** ~~to transfer the~~ offender **with surety** ~~into his responsibility on bail.~~ ~~The surety may be set with or without bail.~~

2. A person may be released from criminal liability by a court under surety if **the person has fully confessed his or her guilt and is sincerely remorseful for having committed the offense, and there are grounds for trusting the person to comply with the law and to refrain from committing any further offenses and to make full reparation for the damage caused by the offense.**

~~1) he commits the criminal act for the first time, and~~

~~2) he fully confesses his guilt and regrets having committed the criminal act, and~~

~~3) at least partly compensates for or eliminates the damage incurred or undertakes to compensate for such where it has been incurred, and~~

~~4) there is a basis for believing that he will fully compensate for or eliminate the damage incurred, will comply with laws, and will not commit new criminal acts.~~

~~3. A bailsman may be the parents of the offender, close relatives, or other persons worthy of a court's trust. When taking a decision, the court shall take into account the bailsman's personal traits or nature of activities and the possibility of exerting a positive influence on the offender.~~

~~4.~~ **3.** The term of the surety bond shall be set from one year up to three years.

~~5.~~ **4. Surety is granted with bail set by the court. A surety may also be granted without bail if the surety obliges to pay a certain amount to the State budget if the person for whom the**

surety is provided commits a new criminal offense during the period of the surety bond. ~~When requesting to release a person on bail with a surety, a bailsman shall undertake to pay a surety in the amount specified by a court.~~ **In exceptional circumstances,** taking account of the surety's ~~personal traits and his~~ financial situation, the court ~~shall specify the amount of the bail~~ ~~or~~ can decide on release from criminal liability under surety without a bail or surety's commitment. The bail bond shall be returned upon the expiry of the term of bail where a person subject to bail does not commit a new criminal act within the term of surety laid down by the court.

~~6~~. **5.** The surety shall have the right to withdraw from the surety bond. In this case, a court shall take account of the reasons for a withdrawal from the surety bond, decide on the return of a bail, also on a person's criminal liability for the committed criminal act, the ~~appointment of another bailsman,~~ or the person's release from criminal liability. **If the surety withdraws from the surety bond, the surety shall be discharged from the obligation to pay the contribution it has undertaken to pay if the person for whom it has provided the surety commits a new criminal offense during the period of the surety bond.**

~~7~~. **6.** If a person released from criminal liability on bail commits a new misdemeanor or negligent crime during the term of bail, a court may revoke its decision on the release from criminal liability and shall decide to prosecute the person for all the criminal acts committed.

~~8~~. **7.** If a person released from criminal liability on bail commits a new premeditated crime during the term of bail, the previous decision releasing him from criminal liability shall become invalid and the court shall decide to prosecute the person for all the criminal acts committed.

8. Where a decision to release a person from criminal liability under surety on the grounds provided for in paragraphs 6 and 7 of this Article is revoked, the bail paid by the surety

shall be for the benefit of the State, or, if the surety is granted without bail, a decision shall be taken to recover for the benefit of the State all or part of the amount which the surety undertook to pay by way of surety."

2. Following the example of foreign countries, it is proposed to reintroduce surety as a custodial measure in addition to bail (Article 133 of the CPC). In this case, the surety would be responsible for the uninterrupted participation of the person suspected or accused of committing the offense in the proceedings.
3. The CC should provide for separate preventive measures for persons exempted from criminal liability, eliminating the possibility of imposing on them the measures of penal influence set out in Chapter IX of the CC as incompatible with the objectives and legal nature of exemption from criminal liability.
4. In the case law, it is suggested that the obligation for the surety to explicitly state the nature of its future positive, educational influence should be waived and that the treatment of the surety as a program for the re-education of the offender be avoided.
5. The CPC should regulate in more detail the procedure for discontinuation of pre-trial investigations by releasing a suspect from criminal liability under surety, i.e. 1) the decision of the pre-trial judge to approve the prosecutor's decision to discontinue the pre-trial investigation on the basis of Article 212(6) of the CCP must be formalised only by a reasoned court order; 2) the question of the termination of the pre-trial investigation and the suspect's exemption from criminal liability under surety must be decided by the court in each case at a hearing at which the public prosecutor, the suspect, the suspect's defence counsel, the person who guarantees the perpetrator of the offence and the victim and the civil claimant and their representatives must be present; (3) when deciding to discontinue the proceedings on the grounds of Article 40 of the CC, the legal consequences of such a decision are made clear to the person, and the person expressly expresses

his or her will to have the proceedings terminated and to waive rights to the judicial proceedings.

6. The CPC should also establish a procedure for the implementation of the waiver of surety bond, and regulate the process of reopening and examining cases after the revocation of a decision to exempt a person from criminal liability.

1.13. LIST OF SCIENTIFIC PUBLICATIONS BY THE AUTHOR

Bagdžius J. (2019) "Surety in Lithuania's Criminal Law", *Teisė*, 112, pp. 124-144. doi: 10.15388/Teise.2019.112.7.

Bagdžius J. (2021) "Surety as Social Phenomena's Applicability in Legal Liability Forms", Vilnius University Open Series, pp. 80-86. DOI: 10.15388/seucl.2021.12.

Bagdžius J. (2022) "The Composition of Surety", *Teisė*, 123, pp. 63-84. doi: 10.15388/Teise.2022.123.5

1.14. LIST OF PRESENTATIONS BY THE AUTHOR AT SCIENTIFIC CONFERENCES

On 9-11 May 2019, a paper based on research results was presented on the topic "Release from criminal liability on bail as a solution of criminal conflict" at the International Doctoral Students' Conference at the AFM Cracow University, Poland.

The Significance of EU Criminal Law in the 21st Century: the Need for Further Harmonisation or New Criminal Policy?" at the ECLAN International Doctoral Seminar on 28-29 January 2021 Research-based presentation on "Surety as Social phenomena's Applicability in Legal Liability Forms

1.15. INFORMATION ABOUT THE AUTHOR

Justinas Bagdžius was born on 30 November 1992 in Alytus, Lithuania.

Education:

2016 - 2022 Ph.D. studies at Vilnius University, Faculty of Law.

2011 - 2016 Master's degree in Law from Vilnius University, Faculty of Law (specialization in Criminal Justice).

2011 - Secondary education at Merkinė Vincas Krėvės Gymnasium.

Professional experience:

Senior Adviser to the Director from 2022 to the present. National Courts Administration.

Head of the Legal Regulation and Representation Division, 2019 - 2022. National Courts Administration, Department of Law and Administration.

2017 - 2019 Senior Specialist. National Courts Administration, Legal Department.

2016 - 2017 Assistant Advocate. Law firm "Kručkauskas, Blaškevičius, Gruodis ir partneriai ConsulTax".

2013 - 2016 Lawyer. Law firm Kručkauskas ir partneriai ConsulTax.

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