

Bail as Social Phenomena's Applicability in Legal Liability Forms

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When one commits a crime, not only does he or she breach the law and violates the interests of the state and the victim, but he or she also shows a great disrespect to the values that are agreed to be protected by law. The state, as a protector of these values, must react to every criminal act (as well as other offences) that infringes legal order. One form of this reaction is criminal liability for crimes. In case of the implementation of criminal liability, the legal criminal relations arise. First of all, between the perpetrator and the victim, secondly, between the perpetrator and the state, where the state is empowered to take all necessary measures to reveal one's crime and to affect the perpetrator so that his or her criminal behaviour would not occur again. So, crime automatically inflicts a criminal conflict between two sides – the offender and the state.

Traditionally, the criminal procedure, if the guilt of the defendant is proven under the law, ends up with conviction and the perpetrator must endure the legal consequences of his or her crime by being punished and receiving a criminal record. On the other hand, in nowadays, the punishment is not the only

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² In this topic and the text below the term “bail” is used as a synonym for legal instrument of surety or guarantee as it is more comprehended in Lithuania's criminal law system. Though, in legal English, the term “bail” has a variety of definitions depending on the context. For most, the term “surety” is known in civil law to describe a person who accepts legal responsibility for another person's debt or behaviour; also “guarantee” can be used as a promise that something will happen or exist; and the “vouch for something/someone” can be used to support the good character of someone, based on your knowledge or experience. These terms will be used in the text depending on the context.

possible state's reaction form to a criminal act and not the only way to reach the goals of the criminal liability. Because the criminal procedure from its very beginnings to conviction is severe and frustrating not only economically but psychologically as well, European countries have developed various criminal procedure diversion forms in their legal system when the defendant can obviate being sentenced and the criminal case can be closed at the earliest stages.

In Lithuania's criminal law, there is an institute of release from criminal liability, which also works as criminal procedure discontinuance form. The release from criminal liability is kind of a deal between the state and the offender, where, if complied with certain terms, the perpetrator can be released from punishment and other elements that characterise criminal liability: 1) sentencing; 2) appointment of punishment; 3) execution of punishment; and most importantly – 4) being convicted and having a criminal record in his or her biography. However, the release does not mean the acquittal of perpetrator as *corpus delicti* of his or her crime must be settled.

Article 40 of the Criminal Code of the Republic of Lithuania states that a person who commits a misdemeanour, a negligent crime or a minor or less serious intentional crime may be released from criminal liability to a request by a person worthy court's trust to transfer the offender into his or her responsibility on bail. A person may be released from criminal liability on this ground if: 1) he or she commits the criminal act for the first time, and 2) he or she fully confesses his or her 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 or she will fully compensate or eliminate the damage incurred, will comply with laws and will not commit new crimes. The release from criminal liability on bail can be implemented from 1 to 3 years.

As this regulation may seem vague, the main principle of this institute's mechanism is the voluntary participation of a trustworthy third person in legal criminal relations aside to perpetrator. This trustworthy third person plays a role of a guarantor by entrusting court that despite offender's criminal behaviour, he or she, generally speaking, is a good human being that does not deserve to be punished and after being released from criminal liability will fully comply with laws and will not commit a crime again. In other words, he or she vouches for him or her as a person and for his or her future behaviour.

Bail (or surety) as a legal instrument is widely known in civil law where it stands as a form of obligation enforcement's assurance. But the surety, as phenomenon, first of all is an expression of a social relation of trust. By guaranteeing (or vouching) for someone you transfer your personal trust for him or her to another person so that your trust could build confidence between those two, who is related (or wants to be related) with another (legal) relations. This basic notion derives from the Roman conception of guarantee and is valid in all modern common or civil law systems when speaking about civil relations. Nonetheless, this phenomenon has its own body in criminal law as well, even though it is not clearly discovered by scholars yet.

Taking its origins, it most likely was a custom, but Romans were the first who developed the "good-named" citizens' participation in criminal procedure. In ancient criminal process, when case was brought to a public court, one specific type of evidence could settle the final result of all charges and offender's fate. Among other evidence, traditionally used in Roman criminal trials, there was an institute of so-called *laudatores* (men of reputation). These *laudatores* were trustworthy, high-ranked Roman citizens who stepped in front of judges and jury to speak not about circumstances of criminal act (*crimina*) but to a character of men on trial. This practice is frequently mentioned in Cicero's pleadings: "These honest Men, whom we all know, and now see before us, were desirous not to give a character in writing but to appear before you in person, to bear testimony to his worth." (Pettingal, 1779, p. 162). Since prestige was appreciated in Roman society by highest expand, the truth and its methods of demonstrations – arguments and evidence – "received their warmest welcome when conveyed by people radiating social prestige, *dignitas* and *auctoritas*." (Du Plessis, *et al.*, 2016, p. 271). It was a custom to bring ten *laudatores* to court and "by the words *wyr nod* or *virī notabiles*, was signified in this case men of reputation, who were known characters, whom the public might confide in (*benestissimos homines, quas nossemus*)" (Pettingal, 1779, 182). These *laudatores* "whose standing added to that of the protagonist and acted as a guarantee of the truth of their testimony, even if it was often only praise." (Du Plessis, *et al.*, 2016, p. 277).

In the middle ages, this institute transformed into so-called compurgation which was common and well-known criminal cases settlement practice in ancient judicial practice in all continental Europe (including Slavs) and Britain

(see e. g. Pettingal, 1779; Machovenko. 2004, p. 51). The defendant could justify himself or herself from accusations with a help of a group of high caste (rank) or good-named society members who swore on reputation of the defendant, verifying his or her testimony of not being guilty.

Today, it is difficult to image resolving cases only by third parties' praise of the defendant and this procedural cases' settlement form might seem too ancient and too alien from our paradigmatic understanding of law. Nevertheless, as trust naturally exist in society, it penetrates into certain legal regulations, developing its own legal shape. Besides release from criminal liability on bail, one disciplinary case that was held to one Lithuanian judge serves as the best example to show this social phenomenon's existence and applicability in legal relations.

On 19 of May 2020, Vilnius district court judge M. S. (depersonalised by the author) was pulled over by the police driving to work with 0,61 alcohol concentration level in his organism. The administrative offence procedure for drunk-driving started and of course his judicial powers were suspended and the disciplinary procedure initiated. This story drew wide public attention. The judge kept apologizing publicly, admitted his unlawful act, showed sincere emotions of regret. But the law is very clear – the ethical, moral and professional standards for judges is above any other public servants. Every judge must protect his or her honourable name and follow the so-called noblesse oblige standard both in his or her professional as well as non-professional activities, because the consequences are indeed harsh. If the judge is being dismissed because of the act that dishonoured judge's name, this judge would not only lose his or her job, but he or she would also lose all rights to social guarantees such as state pension of the judge, he or she never again can be appointed to a judge position because of the loss of his or her good reputation.

Despite the disciplinary procedures in the judiciary self-government bodies, the President of the Republic of Lithuania did not wait for its results and initiated M. S. dismissal independently. The President addressed the Judicial Council for advice to dismiss this judge on the Constitutional ground of dishonouring judge's name. So, the President is certain that M. S. dishonoured judge's name by drunk-driving, the question is now on the table of the Judicial Council. I should quickly explain that The Judicial Council is an executive body of the autonomy of courts ensuring the independence of courts and judg-

es, which is composed of seventeen members (judges only). According to the Constitution of the Republic of Lithuania, this special body of judiciary must advise the head of the state for every question that concerns judges: appointment, career, dismissal. And if the advice is not given, this is legally binding to the President and he or she cannot take its final decision on that judge. That is the implementation of checks and balances idea in Lithuania's constitutional regulations concerning judges.

This was not the first time that a judge who was operating the vehicle under the influence of alcohol was as at disciplinary procedure. Almost everyone was dismissed from the position by default. Without a doubt, drunk-driving dishonours judge's name. But this time the Judicial Council did not advise the President to dismiss judge M. S. This decision was not accepted very favourably. This case was and is debated broadly. The constitution law experts say that the Judicial Council overstepped its discretionary powers because the constitutional doctrine clearly states that when the President asks for advice, the Judicial Council must 1) determine whether the act of the judge occurred and 2) answer whether this act dishonoured judge's name. If these two conditions are being determined, the Judicial Council has no other option but to advise the Present to dismiss the judge.

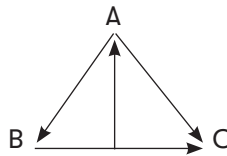
What was special about M. S. case? At the same time that the news of disciplinary proceedings of M. S. was released, Lithuanian judges from different courts began to address independently the Judicial Council and the Judicial Court of Honour stating basically one thing: they personally know M. S., they are shocked by his act, they do not excuse his actions, but they actually know him, he is a good human being, qualified and honoured judge that has huge respect and empathy for others, responsible and excellent legal professional and it would be a great loss for all judiciary if he was dismissed. In other words, these judges (who are respected because of their status) vouched for M. S. and his character. They vouched for him as a good human being, more importantly they vouched for him as a professional judge.

The Judicial Council noted on its resolution refusing to advise the President to dismiss judge M. S.: "The Judicial Council notes that it is the representation of judges elected by the entire community of judges of the Republic of Lithuania. The Judicial Council, deciding on the issue of advice to the President of the Republic, so the question of trust in a particular judge, cannot

ignore the strong trust in M. S. expressed by the judiciary <...>, guaranteeing for his professional and personal qualities.”

The judges vouched for M. S. They expressed their trust in him and they asked to forgive him. There are no legal norms allowing to vouch in disciplinary procedures. On the other hand, what to do if this social relation of trust occurs in certain legal situation? Should it be ignored and rejected as impossible?

Hence, we can identify a clear pattern of long-existing socio-legal phenomenon of bail (guarantee; surety; vouch) that transforms social trust relationship into legal trust relationship:



The scheme above describes the mechanism of a legal vouch and the social trust’s transformation into legal one. Here, A stands for official authority; B is the guarantor who is not involved in legal relations between A and C, though has close relation to C (*e.g.*, family, friend, colleague, *etc.*); and C is the offender. A has to impose legal sanctions on C because of his or her unlawful act. B and C have close social bond. B steps in legal relations between A and C in favour of C vouches for him or her (his or her personal qualities and future behaviour). Because A sees B as trustworthy (based on evidence that supports his or her trustworthiness) he or she can develop trust on C’s personality so the sanction for his or her responsibility could be lessen or he or she could be pardoned. In terms of release from criminal liability on bail, the perpetrator is being given a term from one to three years to prove the trust he or she was granted. However, the principle of the “triangle of trust” that could legally happen in any other legal relations works in the same way – it builds trust and creates legal relations of trust between parties.

Over past few decades, trust as social phenomenon has brought a broad attention of social sciences (philosophy, history, sociology) and, unfortunately, “many authors have found the concepts to be opposition to one another”

(Cross, 2005, p. 84–85). The participation of a trustworthy society member due to build trust relationship between government authorities and individual has not been discovered yet. Though it may be the essential key in recognising trust as a legal principal, moreover, it supports approaches that find cooperation between trust and law. Since trust in law is a quite unexplored field, especially, in criminal law, the institute of release forms criminal liability on bail as well as genesis of a vouch as social phenomena could be a starter for broader discussions between scholars.

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Justinas Bagdžius is a PhD Student in Vilnius University Faculty of Law. He also is the Head of Legal regulation and Representation division at National Courts Administration of the Republic of Lithuania. His field of research includes national criminal law, general part of Criminal Code of the Republic of Lithuania, specifically the release from criminal liability by vouch also diversion mechanism in criminal procedure.
