

PROPORTIONALITY OF THE APPLICATION OF CRIMINAL LIABILITY FOR GIFTS IN THE HEALTHCARE SYSTEM OF LITHUANIA: ALTERNATIVES FOR EFFECTIVE CORRUPTION PREVENTION

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Summary: Proportionality is a fundamental principle of criminal law. The issue whether the application of criminal liability to patients and doctors for participating in illegal gift “transactions” with the use of descriptive, analytical, logical, and comparative methods was examined. Focusing on utilitarianism and retributivism, the content of proportionality was presented: the balance between benefit to society and harm to the offender, the effectiveness of punishment, the implementation of justice as retribution, and the dangerousness of the offence and the offender. The conclusion was made that the criminal liability for gratitude gifts in the healthcare system is not proportionate. Consequently, recommendations were made for the establishment of disciplinary or administrative liability for symbolic gifts of gratitude in the healthcare sector of Lithuania.

Keywords: Corruption, Healthcare, Criminal Liability, Proportionality, Utilitarianism, Retributivism

1 Introduction

Every state in the world suffers from corruption, which poses a threat to society and every citizen. For this reason, any risks of corruption are fought *inter alia* with the application of criminal liability to offenders. The common form of corruption is bribery, the grey area of which is gift giving. This practice is quite widespread in the healthcare sector of Lithuania. According to the latest surveys, in the last

two years 14 % of Lithuanians gave gifts to doctors.¹ However, such gifts can be considered bribes under the Criminal Code of the Republic of Lithuania (hereinafter – CC).²

On the other hand, a recent turn in the case law of Lithuanian courts, applying stricter criminal liability for corruption crimes³, raises another question – is it proportionate to apply criminal liability for all gifts in the healthcare system? The ongoing scientific debate shows that there is no universal support for the criminalization (or prohibition) of gifts in the healthcare sector. E.g., some scientists claim that the prohibition of gifts reduces the likelihood of illegal influence on doctors.⁴ However, others argue that gifts do not pose a sufficient danger to the public interest and, therefore, should not be prohibited or criminalized.⁵

Such discussion encouraged to investigate with the use of descriptive, analytical, logical, and comparative methods whether the application of criminal liability for giving/receiving gifts in the healthcare system is proportionate. Due to the limits of the article, the essential elements of proportionality are revealed in the light of the main philosophies of criminal law – utilitarianism and retributivism. Also, the concept of proportionality revealed in the jurisprudence of the Constitutional Court of the Republic of Lithuania and the Supreme Court of Lithuania as well as scientific doctrine is presented.

A gift in this article means only a symbolic gift of gratitude (i.e., not exceeding 50 €, non-monetary, in the absence of a doctor's request or any prior agreement before or during the service, given/received after the healthcare service has been fully provided, given at the initiative of a patient). A patient is any person giving a gift to a doctor. A doctor is any employee providing healthcare services. Sources in Lithuanian, unless marked, were translated by the authors.

1 ELTA. *Tyrimas: neoficialios dovanos medikams populiariesnės tarp vyresnių gyventojų* (Research: Informal Gifts for Doctors are more Popular among the Elderly Population). [online]. Available at: <<https://www.lrt.lt/naujienos/sveikata/682/2212965/tyrimas-neoficialios-dovanos-medikams-populiariesnes-tarp-vyresniu-gyventoju>> Accessed: 03.03.2024.

2 Criminal Code of the Republic of Lithuania (hereinafter – CC). *Official Gazette*, 2000, no. 89–2741, art. 230, sec. 4.

3 E.g., Lithuania v. R.K. et al. Court of Appeal of Lithuania. Judgment of 22 November 2023. Application no. 1A-40-307/2023; Lithuania v. V.Š. Court of Appeal of Lithuania. Judgment of 28 February 2024. Application no. 1A-166-870/2024.

4 MACKAY, Kathryn. Rules and Resistance: A Commentary on “An Archeology of Corruption in Medicine”. *Journal of Bioethical Inquiry*, 2022, vol. 19, no. 1, p. 127.

5 ANDERHECK, William. Yes: If they are Given Out of Beneficence Or Appreciation. *The Western Journal of Medicine*, 2001, vol. 175, no. 2, p. 76.

2 Proportionality and its Concept in the Context of Utilitarianism and Retributivism

Proportionality is one of the most important principles of law, inseparable from justice.⁶ Proportionate legal liability maintains the goal of justice – to punish the offender fairly. Proportionality ensures that the punishment is not a revenge, but a means to implement the purpose of just punishment. It is also noted that proportionality is inseparable from the rule of law.⁷

The emergence of the principle of proportionality is associated with late 19th century German police law.⁸ Today, proportionality is primarily a principle of constitutional law. Hence, the concept of this principle is explained in the decisions of the Constitutional Court of the Republic of Lithuania (hereinafter – the Constitutional Court), which stipulate that: “the measures established by the state for violations of law must be proportional (adequate) for the violation of law, must be in conformity with legitimate and commonly important objectives, must not restrict the person more than is reasonably necessary to achieve these objectives”⁹ Thus, these elements of the proportionality have been distinguished: 1) the validity of the stringency and the choice of the measures, 2) the legitimacy and importance of the goals, 3) the adequacy of the ratio between the measures selected and the goals pursued. All these elements ensure proportionality: “there must be a fair balance (proportion) between the objective sought and the means to attain this objective, between violations of law and penalties established for these violations. These principles do not permit establishing such penalties for violations of law, as well as such sizes of the fines, which would evidently be disproportional (inadequate) to the violation of law and the objective sought.”¹⁰

Analysing the proportionality of legal regulation, it must be assessed, “whether the measures established in the law are in compliance with legitimate objectives that are important to society, whether these measures are necessary in order to attain the specified objectives and whether these measures do not restrict the rights and freedoms of the person apparently more than necessary in order to attain the said objectives.”¹¹ Thus, legal liability is proportional, when the necessity of its application is based on legitimate, important goals, and the rights and freedoms of the offender are restricted no more than is necessary to achieve the objectives:

6 ENGLE, Eric. The History of the General Principle of Proportionality: An Overview. *Dartmouth Law Journal*, 2012, vol. 10, no. 1, p. 10.

7 The ruling of the Constitutional Court of the Republic of Lithuania of 2 October 2001. *Official Gazette*, 2001, no. 85–2977.

8 MEßERSCHMIDT, Klaus. Efficiency and the principle of proportionality. Should lawyers learn from economists? 2003, in: KARGAUDIENĖ, Aušra. Principle of proportionality in administrative law and its application in Lithuanian courts. *Jurisprudencija*, 2005, vol. 78, no. 70, p. 30.

9 The ruling of the Constitutional Court of the Republic of Lithuania of 2 October 2001. (n 7).

10 The ruling of the Constitutional Court of the Republic of Lithuania of 6 December 2000. *Official Gazette*, 2000, no. 105–3318.

11 The ruling of the Constitutional Court of the Republic of Lithuania of 29 December 2004. *Official Gazette*, 2005, no. 1–7.

“the established legal measures must be necessary in a democratic society and suitable for achieving legitimate and universally important objectives (there must be a balance between the objectives and measures), they may not restrict the rights of the person more than it is necessary in order to achieve the said objectives, and if these legal measures are related to the sanctions for the violation of law, in such case the aforementioned sanctions must be proportionate to the committed violation of law.”¹² Consequently, a legal liability that does not correspond to the purpose of punishment is disproportionate.¹³

Since constitutional law is the basis of all branches of law¹⁴, the revealed content of proportionality is also applicable to criminal law. The Supreme Court of Lithuania (hereinafter – the SCL) has also recognized that for certain acts it is not necessary to apply the strictest criminal liability, if there are other means to achieve the goals.¹⁵ Thus, proportionality allows to determine whether the establishment of criminal liability for certain actions is justified and whether the objectives of such regulation cannot be achieved through the application of alternative types of legal liability.

In addition to case law¹⁶, the content of proportionality is revealed in legal doctrine, which perceives proportionality as a guarantee of a humane democratic system.¹⁷ This is essential in the application of criminal liability because strict criminal measures affect the most important human rights and freedoms. Proportionality also binds the legislator, which should not establish inadequate legal liability: it must always consider various circumstances (severity of the violation, guilt, other objective and subjective signs) and whether they justify the necessity of applying a certain type of legal liability.¹⁸ The adequacy of legal liability depends not only on the nature of the acts, but also on the behaviour of the perpetrator.¹⁹ Thus, the proportionality of legal liability is ensured only

12 The ruling of the Constitutional Court of the Republic of Lithuania of 13 December 2004. *Official Gazette*, 2004, no. 181–6708; The ruling of the Constitutional Court of the Republic of Lithuania of 29 September 2005. *Official Gazette*, 2005, no. 117–4239.

13 The ruling of the Constitutional Court of the Republic of Lithuania of 10 November 2005. *Official Gazette*, 2005, no. 134–4819.

14 SINKEVIČIUS, Vytautas. Principles and limits of interpretation of the Constitution. *Jurisprudencija*, 2005, vol. 67, no. 59, p. 8.

15 Lithuania v. R.P. Supreme Court of Lithuania. Judgment of 10 November 2015. Application no. 2K-P-100-222/2015.

16 E.g., Lithuania v. V.R. Supreme Court of Lithuania. Judgment of 29 December 2016. Application no. 2K-449-942/2016; Lithuania v. R.T. et al. Supreme Court of Lithuania. Judgment of 27 December 2007. Application no. 2K-594/2007.

17 BIKELIS, Skirmantas. Rethinking system of sanctions for trafficking of goods: the problem of proportionality (I). Principle of proportionality and criminal sanctions. *Teisės problemos*, 2012, vol. 78, no. 4, p. 7.

18 DACHAK, Hadi. The Principle of Proportionality of Crime and Punishment in International Documents. *International Journal of Multicultural and Multireligious Understanding*, 2021, vol. 8, no. 4, p. 688.

19 Ibid.

after a thorough assessment of the violation and the totality of the circumstances surrounding the offender.

The content of proportionality revealed above coincides with the proportionality test presented in the doctrine, which consists of four subtests: “the adequacy of the goal of the restriction of rights, the connection between the restriction of rights and the goal pursued, the necessity of the means and proportionality *stricto sensu*.”²⁰ Proportionality *stricto sensu* is a balance between public interest and human rights.²¹ Thus, proportionality *stricto sensu* means that the benefit to society must outweigh the harm caused to the offender.²² This concept of proportionality is close to utilitarianism. However, some scholars oppose such an interpretation of proportionality as immoral²³ because the public benefit may justify the punishment in the absence of guilt.²⁴ Consequently, benefit/harm or similar economic tests are considered an inadequate means of ensuring human rights.²⁵ Such an approach is based *inter alia* on retributivism, which relates proportionality to the actions of the offender, rather than to public benefit.²⁶

Thus, proportionality requires the application of adequate measures to achieve legitimate objectives necessary for society. However, the concept of it also depends on different philosophies of law.²⁷

2.1 Utilitarianism

The founder of modern utilitarianism, Jeremy Bentham, stated that every human's behaviour is governed by pains and pleasures.²⁸ Justice depends on utility: the right behaviour is that which gives the most benefit and causes the least harm.²⁹ Bentham claimed that “the principal aim of punishment is the prevention of offences, rather than retribution.”³⁰ Hence, for utilitarians, possible consequences of liability are the most important question. The goal of the legislator from the

20 MALINAUSKAS, Vyngantas. Theoretical and methodological aspects of ensuring a balance between human rights and public interest. Doctoral thesis, Vytautas Magnus University, Kaunas, 2018, p. 7.

21 SPECTOR, Horacio. Constitutional proportionality and moral deontology. *Jurisprudence*, 2021, vol. 12, no. 4, p. 517.

22 BARAK, Aharon. *Proportionality: Constitutional Rights and Their Limitations* (Cambridge University Press, 2012), in: MALINAUSKAS, Vyngantas. (n 20), p. 250.

23 LETSAS, George. Proportionality as Fittingness: The Moral Dimension of Proportionality. *Current Legal Problems*, 2018, vol. 71, no. 1, p. 62.

24 Ibid., p. 8; ROBINSON, Paul, H. *Distributive Principles of Criminal Law: Who Should be Punished How Much*. University of Pennsylvania, 2008, p. 12.

25 ENGLE, Eric. (n 6).

26 HIRSCH, Andrew von. Proportionality in the Philosophy of Punishment. *Crime and Justice*, 1992, vol. 16, p. 59.

27 FISH, Morris, J. An Eye for an Eye: Proportionality as a Moral Principle of Punishment. *Oxford Journal of Legal Studies*, 2008, vol. 28, no. 1, p. 63; HIRSCH, Andrew von. (n 26), p. 57.

28 BENTHAM, Jeremy. *An Introduction to the Principles of Morals and Legislation*. Kitchener: Batoche Books, 2000, p. 14.

29 Ibid., p. 14–15.

30 FISH, Morris, J. (n 27), p. 64.

utilitarian point of view is to achieve maximum happiness for society,³¹ but punishment is always related to causing pain, which is justified only if it helps to avoid more pain to society³².

Utilitarians see criminal liability as “a costly instrument of public policy, permissible only when its benefits in reducing future crime outweigh the pain, fear, and public expense it imposes.”³³ Thus, utilitarianism links proportionality with minimal cost: “criminal laws are unjustified (or infringe the principle of minimalism) unless they are designed to prevent harm, prohibit wrongful conduct and impose a punishment that is deserved.”³⁴ Bentham also gave examples when punishment should not be applied: i.e., when it is ineffective, too expensive or unnecessary.³⁵ Consequently, criminal liability is proportionate only if it is effective and there is no other way to achieve the same goals.

In conclusion, utilitarianism connects proportionality with the balance of benefit/harm: proportional liability must bring the most benefit to society and cause the least harm to the offender. Also, criminal laws must be effective and cannot unnecessarily restrict the rights of the offender. However, opponents of utilitarianism associate proportionality not with the analysis of benefit/harm, but with adequate retribution.

2.2 Retributivism

Under retributivism, liability must be imposed not for the welfare of society, but for the offence committed.³⁶ The offender must “deserve” the punishment.³⁷ According to retributivists, the utilitarian assessment of the consequences alone without considering the offender and his/her actions may justify the punishing of innocent since such punishment might deter from violating the law or satisfy society’s desire for revenge and, therefore, be considered “proportionate”.³⁸ For these reasons, proportionate legal liability from the point of view of retributivism corresponds to the guilt of the offender and the violation – it must neither be too soft nor too strict;³⁹ its purpose is to punish the offender, but not to benefit society.

31 DACHAK, Hadi. (n 18), p. 687.

32 BENTHAM, Jeremy. (n 28), p. 134.

33 BINDER, Guyora, SMITH, Nicholas, J. Framed: Utilitarianism and Punishment of the Innocent. *Rutgers LJ*, 2000, vol. 32, p. 116.

34 CLARKSON, C., M., V. Why Criminal Law? The Role of Utilitarianism: A Response to Husak. *Crim Law and Philos*, 2008, vol. 2, no. 2, p. 132.

35 BENTHAM, Jeremy. (n 28), p. 134; EMIGHOLZ, Carl. Utilitarianism, Retributivism and the White Collar-Drug Crime Sentencing Disparity: Toward a Unified Theory of Enforcement. *Rutgers Law Review*, 2006, vol. 58, no. 2, p. 600.

36 KANT, Immanuel. *The Metaphysical Elements of Justice*. LADD John (trans). London: The Macmillan Publishing Company, 1965, quote in: CORLETT, J., Angelo. Making Sense of Retributivism. *Philosophy*, 2001, vol. 76, no. 295, p. 86.

37 Ibid.

38 LETSAS, George. (n 23), p. 60–61; **but see** BINDER, Guyora, SMITH, Nicholas, J. (n 33), p. 118.

39 ROBINSON, Paul, H. (n 24), p. 9.

Although retributivism is criticized as promoting “an eye for an eye” justice, proponents of this theory claim that punishment is imposed on “a freedom for a freedom’ basis”⁴⁰. The offender who chooses to harm public deserves punishment. Also, supporters of the “negative” theory of retribution argue that liability can be more lenient than required by justice or not applied at all,⁴¹ e.g., in cases of minor violations, to use limited resources for curbing more significant crimes.⁴² Hence, even if there is a reason to punish, there may be a valid reason not to do so. Such ideas are prominent in the jurisprudence of the Supreme Court of Canada, where retribution has been distinguished from revenge: “unlike vengeance, retribution incorporates a principle of restraint; retribution requires the imposition of a just and appropriate punishment, and nothing more.”⁴³ Consequently, retributivism does not justify the blind application of *lex talionis* since legal liability based on mere revenge is disproportionate.

Under retributivism, the application of legal liability for the prevention of violations is disproportionate,⁴⁴ as it can justify excessively harsh punishments.⁴⁵ Such a conclusion is made in accordance with Kant’s second categorical imperative, which obliges to consider a person not as a means, but as an end.⁴⁶ Hence, the offender cannot be a means to achieve social goals (combating crime, increasing prevention), but he/she himself/herself is the goal of punishment. Thus, the main purpose of punishment and retribution is to restore justice.

In conclusion, proportionality in retributivism is associated with the offender’s act. Punishment must correspond to the actions committed by the offender; however, it cannot become a means of achieving social goals. However, retribution is not based solely on the implementation of *lex talionis*. Proportionate punishment is one that, considering the offender’s guilt and actions, is adequate to the goal pursued – to restore justice.⁴⁷

Although utilitarianism and retributivism present different concepts of proportionality, they are not utterly opposite, and the ideas of both theories are significant when assessing the proportionality of legal liability. E.g., retributivism does not deny that proportional punishment can also promote public welfare,⁴⁸ whereas utilitarianism relates the preventive effect of punishment to the offence committed in the past.⁴⁹ Many scholars attempt to combine or complement

40 MINKKINEN, Panu. “If Taken in Earnest”: Criminal Law Doctrine and the Last Resort. *Howard Journal*, 2006, vol. 45, no. 5, in: CLARKSON, C., M., V. (n 34).

41 CORLETT, J., Angelo. (n 36), p. 78; CARO, Mario De. Utilitarianism and Retributivism in Cesare Beccaria. *Italian Law Journal*, 2016, vol. 2, no. 1, p. 4.

42 CORLETT, J., Angelo. (n 36), p. 78.

43 R. v. M. (CA). [1996] 1 SCR 500 (Canadian case, emphasis in original).

44 FRASE, Richard. Punishment Purposes. *STAN. L. REV.*, 2005, vol. 58, no. 67, p. 68.

45 CARO, Mario De. (n 41), p. 6.

46 KANT, Immanuel. *Groundwork of the Metaphysics of Morals*. GREGOR, Mary (trans, ed). Cambridge: Cambridge University Press, 1997, p. 38.

47 CARO, Mario De. (n 41).

48 CORLETT, J., Angelo. (n 36), p. 78.

49 BINDER, Guyora, SMITH, Nicholas, J. (n 33), p. 132.

these theories.⁵⁰ Thus, the elements of proportionality proposed by both theories are important, and proportional regulation must meet the proportionality requirements of both utilitarianism and retributivism.

3 Proportionality of the Application of Criminal Liability for Gifts in the Healthcare System

This subsection assesses whether the application of criminal liability for gifts in the healthcare system is proportional, considering the concept of proportionality presented in the former subsection.

As mentioned, proportionality is ensured when the chosen measures are adequate for the goals pursued. The main purpose of applying criminal liability for gifts in the healthcare system is the prevention of corruption.⁵¹ Hence, the main question is whether criminal liability for gifts is an adequate measure for the prevention of corruption?

The value of most gratitude gifts in the healthcare system usually does not exceed 50 €, thus, giving/receiving gifts is recognized as a criminal offence, without applying imprisonment. However, offenders may be sentenced to arrest for up to 45 days, a fine of up to 25'000 € or imprisonment for up to 2 years, together with other punitive measures, even not established by law.⁵² Such punishments significantly restrict the rights of the offenders to freedom, property, to choose a profession, etc. The aim of such measures is to avoid a negative reputation for healthcare institutions, to encourage the offenders not to commit violations, etc.⁵³ These goals are important because they protect the interests of society – the availability and high-quality of healthcare services. However, the adequacy of the application of strict measures to achieve the above-mentioned goals depends on whether they cannot be achieved with less restrictive measures.

Firstly, criminal liability, as the strictest type of legal liability, causes the greatest damage to the offender. Such harm is justified from a utilitarian point of view if the wrongdoer's actions cause even greater harm to society.⁵⁴ Comparing the dangerousness of giving/receiving gifts in the healthcare system with the harm that offenders face when criminal liability is applied, it can be concluded that the harm of such violations to public interest is lower than the harm of applying criminal liability to the offenders. Most patients do not seek to bribe doctors but want to express their gratitude; actions are directed to the past, not to the future,

50 HAIST, Matthew. Deterrence in a Sea of Just Deserts: Are Utilitarian Goals Achievable in a World of Limiting Retributivism. *J. Crim. L. & Criminology*, 2009, vol. 99, no. 3, p. 792; FISH, Morris, J. (n 27), p. 66.

51 Lithuania v. K.D. Supreme Court of Lithuania. Judgment of 3 February 2022. Application no. 2K-23-628/2022.

52 CC. (n 2), art. 47, sec. 3, subsec. 1, sec. 8, art. 48, secs. 2, 7, art. 49, sec. 3, art. 225, sec. 4, art. 226, sec. 5., art. 227, sec. 4.

53 Lithuania v. K.D. (n 51).

54 DRESSLER, Joshua. *Understanding Criminal Law*. Carolina Academic Press, 2001, quote in: EMIGHOLZ, Carl. (n 35), p. 599.

thus, the influence on doctors is minimal; the only possible damage is a negative impact on the prestige of the healthcare system and its institutions, which, in the absence of doctors' extortion of gifts, is minor. However, the application of criminal liability causes negative consequences for both the doctor and the patient (severe punishments limit freedom, the right to property, doctors lose an opportunity to practice medicine for some time⁵⁵, which possibly might be the only source of livelihood, etc.) Thus, according to the benefit/harm balance, the criminalization of symbolic gifts in the healthcare system is disproportionate.

Secondly, punishment must be effective, otherwise it causes unjustified harm to the offender.⁵⁶ Since criminal liability aims to fight corruption, its application should reduce the level of corruption and the gift giving practice in the healthcare sector. Unfortunately, there are no significant changes in Lithuania.⁵⁷ A slight decrease in gift giving in the healthcare system is not the result of (almost non-applicable) criminal liability, but rather of societal changes⁵⁸ and anti-corruption education.⁵⁹ The assessment of the costs of the application of criminal liability for gifts in the healthcare system is also disproportionate because it is too expensive to initiate criminal proceedings due to the low value of gifts⁶⁰, hence, there are almost no criminal cases. Thus, criminal liability is not an adequate tool to combat the smallest violations of a corrupt nature, i.e., the giving/receiving of symbolic gifts in the healthcare system.

Under retributivism, it is important to evaluate person's actions and his/her own characteristics.⁶¹ First, giving/receiving symbolic gifts causes less damage to public interests than other acts of bribery (giving expensive gifts, money, demanding bribes, giving gifts for illegal services, etc.) Such actions cause little damage to public interest, as symbolic gifts hardly affect the availability of healthcare services. Second, most gifts are given after the service has already been provided, without seeking to bribe the doctor, to express gratitude for services that restored health or saved life. The danger of such acts is minimal, they do not contain elements testifying malicious and contrary to the law behaviour. The dangerousness is not indicated by the characteristics of the offenders either: most

55 E.g., Lithuania v. A.Ž. Supreme Court of Lithuania. Judgment of 23 February 2022. Application no. 2K-35-719/2022.

56 RAWLS, John. *Collected Papers*. FREEMAN, Samuel (ed). Harvard University Press, 1999, in: CORLETT, J., Angelo. (n 36), p. 80.

57 European Commission. *Special Eurobarometer 534*. Luxembourg: Publications Office, 2023, p. 24.

58 ELTA. (n 1).

59 SLOT, Brigitte, SWART, Linette de, WEISTRA, Kim, OORTWIJN, Wija, WANROOIJ, Niels van, RAETS, Tess. *Updated Study on Corruption in the Healthcare Sector*. Luxembourg: Publications Office, 2017, p. 63, 126, 129.

60 BERENTA, Juozas. *Tarp kyšio policininkui ir vokelio gydytojui nėra jokio skirtumo (There is no Difference between a Bribe to a Policeman and an Envelope to a Doctor)*. [online]. Available at: <<https://www.delfi.lt/verslas/verslas/j-berenta-tarp-kysio-policininkui-ir-vokelio-gydytojui-nera-jokio-skirtumo-61604783>> Accessed: 15.04.2024.

61 GRAY, David. Punishment as Suffering. *Vanderbilt Law Review*, 2010, vol. 63, no. 6, p. 1631.

doctors and patients are not inclined to intentionally commit criminal acts. The fact that gifts are given at the initiative of patients does not confirm that doctors purposefully seek to obtain a benefit and patients want to bribe them. Therefore, retributivism also does not justify the application of criminal liability for giving/receiving symbolic gifts in the healthcare system because the circumstances describing the offence and the offender presuppose that the application of criminal punishment in this case is too harsh.

In conclusion, the application of criminal liability for gratitude gifts in the healthcare system contradicts the concept of the utilitarian and retributive proportionality. Thus, establishing a softer legal liability for such acts would be more in line with the principle of proportionality.

4 Alternative Types of Legal Liability for Giving/Receiving Symbolic Gifts in the Healthcare System

It is said that the most appropriate anti-corruption strategy is the “decriminalization of morally neutral offense,”⁶² an increase in the inevitability of punishment,⁶³ a reduction in “the need to impose overly harsh sentences,”⁶⁴ and in the need to apply criminal liability, the punishments imposed must “strike a balance between restitution, moral culpability and adequate deterrence.”⁶⁵ Thus, legal liability for corruption must not be limited to criminal law. To prevent corruption more effectively, it is important to reduce the burden of proving illegal actions, increase control, and make possible the application of different types of legal liability.⁶⁶

One of the goals of criminal law is to inform offenders of what actions are so wrong that they are subject to harshest punishments.⁶⁷ Still, criminal liability is applied for crimes like theft or fraud, but if these offences cause the least damage to public, administrative liability is applied in Lithuania.⁶⁸ However, corruption violations are not differentiated, and the smallest ones are considered criminal offences, without assessing proportionality.

Justice is defined as the constant goal to “give every man his due.”⁶⁹ Thus, a person formally violating the law must be given a milder punishment than the one who deliberately, purposefully and grossly behaves against the law, intentionally seeking harmful consequences for public. Therefore, it is necessary to look for alternative effective ways to solve the problem of giving/receiving gifts in the

62 EMIGHOLZ, Carl. (n 35), p. 614.

63 POSNER, Richard, A. An Economic Theory of the Criminal Law. *Columbia Law Review*, 1985, vol. 85, no. 6, p. 1205.

64 EMIGHOLZ, Carl. (n 35), p. 614.

65 Ibid.

66 Ibid.

67 CLARKSON, C., M., V. (n 34), p. 133.

68 CC. (n 2), art. 178, 182; Code of Administrative Offences of the Republic of Lithuania (hereinafter – CAO). TAR, 2015, no. 11216, art. 108.

69 MONRO, Charles, Henry (trans). *The Digest of Justinian*. Cambridge University Press, 1904, p. 5.

healthcare system. In this case, two types of legal liability ensuring proportionality should be considered, i.e., disciplinary and administrative liability.

4.1 Disciplinary Liability

The SCL has stated that: “Article 3, paragraph 1, point 9 of the Law on Civil Service of the Republic of Lithuania establishes that a civil servant must behave impeccably, not accept gifts, money or services, exclusive benefits and discounts from individuals or organizations, seeking to influence him/her. ... The offenders [in this case] may have acted inappropriately in terms of the Law on Civil Service by accepting sweets and drinks from J. M., but this does not mean that they should be prosecuted.”⁷⁰ Hence, accepting gifts in the public sector is primarily an inappropriate act from the point of view of official ethics. Although the Law on Civil Service does not apply to employees of the healthcare system⁷¹, similar prohibitions are enshrined in the legal acts applicable in this sector.⁷² Hence, the abovementioned interpretation of the Court could also be applied in the healthcare system. Thus, doctors receiving symbolic gifts should be subject to disciplinary instead of criminal liability. For that purpose, a reinterpretation of case law is necessary to delimitate disciplinary and criminal liability considering the formal dangerousness of a particular gift even if the actions are related to the exercise of powers. Such application can also be based on the general principle of law that in case of competition of norms, a milder responsibility must be applied.⁷³

Nevertheless, if doctors are subject to disciplinary liability, what legal liability should be applied to patients? If it is criminal liability, then such regulation will be disproportionate because different types of liability should not be applied to the offenders whose actions are related. According to H. L. A. Hart, justice requires to “treat like cases alike and different cases differently.”⁷⁴ Since proportionality ensures justice, different liability applied to equal cases is disproportionate. Applying legal liability to both patients and doctors seeks the same goal (corruption prevention), thus, applying different measures contradicts proportionality. The fact that the Criminal Code of Lithuania establishes a stricter liability for passive bribery than for active bribery⁷⁵ does not negate such a conclusion because many gifts are given

70 Lithuania v. I.P., I.A., Ž.L. Supreme Court of Lithuania. Judgment of 3 November 2020. Application no. 2K-221-942/2020.

71 Law on the Civil Service of the Republic of Lithuania. *Official Gazette*, 1999, no. 66-2130, art. 2, sec. 8.

72 E.g., Code of Conduct for Employees of Healthcare Institutions, *TAR*, 2021, no. 16035, sec. 5.7.

73 ŠEDBARAS, Stasys. *Administracinė atsakomybė (Administrative Liability)*. Vilnius: Justitia, 2005, p. 73.

74 HART, H., L., A. *The Concept of Law*. New York: Oxford University Press, 1961, quote in: SUMMERS, Robert, S. H.L.A. Hart on Justice. *The Journal of Philosophy*, 1962, vol. 59, no. 18, p. 498.

75 CC. (n 2), arts. 225, 227.

at the initiative of patients⁷⁶, which does not indicate that receiving a gift is a more dangerous act than giving it.

Therefore, it is not right to apply legal liability only to doctors, without evaluating and punishing patients' actions, carried out on their initiative. Such regulation would impose a disproportionate burden on doctors, while the initiators of the actions (patients) would be untouchable. As the level of corruption in the healthcare system remains high, educational activities are insufficient. Consequently, the determination of administrative liability for both subjects of illegal gift giving/receiving relations must be considered.

4.2 Administrative Liability

One of the goals of administrative liability is to protect the same public interests protected by criminal law. However, administrative liability is applied when the degree of danger of offences is lower.⁷⁷ Since the actions of giving/receiving symbolic gifts in the healthcare system pose a smaller risk to public interest, establishing administrative liability for such acts would ensure proportionality.

It is not the severity of the punishment, but the inevitability of the punishment that increases the prevention of legal violations.⁷⁸ This is important in the fight against corruption. As foreign practice shows, in states with the lowest level of corruption, the punishments are not harsh, however, the disclosure of corruption activities is so disadvantageous that individuals, fearing the inevitable consequences, rarely consider committing corrupt acts.⁷⁹ However, in states where punishments for corruption crimes are severe, corruption level is also higher.⁸⁰ Since administrative liability, unlike criminal liability, can be applied not only by courts but also by a wider range of entities,⁸¹ the establishment thereof could create conditions for more effective application of legal liability to offenders and could increase the prevention of corruption.

Thus, the requirements of proportionality would best be met by the administrative liability applied to patients and doctors for symbolic gifts in the healthcare system. The implementation of these measures would help to more efficiently⁸² ensure the goals of corruption prevention and professional ethics in

76 European Commission. (n 57), p. 11, 95.

77 ŠEDBARAS, Stasys. (n 73), p. 68.

78 POSNER, Richard, A. (n 63).

79 E.g., in Denmark, even petty corruption can irreparably damage the reputation of business entities (TOPCHII, Vasyi, ZADEREIKO, Svitlana, DIDKIVSKA, Galyna, BODUNOVA, Olesia, SHEVCHENKO, Dmytro. International Anti-Corruption Standards. *Baltic Journal of Economic Studies*, 2021, vol. 7, no. 5, p. 282).

80 E.g., in China, the death penalty for corruption crimes is established, but China ranks only 76th in the Corruption Perceptions Index (ZHU, Jiangnan. Do Severe Penalties Deter Corruption? A Game Theoretic Analysis of the Chinese Case. *China Review*, 2012, vol. 12, no. 2, p. 1; Transparency International. *Corruption Perceptions Index*. [online]. Available at: <<https://www.transparency.org/en/countries/china>> Accessed: 23.04.2024.

81 CAO. (n 68), art. 589, art. 615, sec. 1.

82 ŠEDBARAS, Stasys. (n 73), p. 75.

the healthcare system, which criminal liability is not capable to fulfil. The only problem with the establishment of administrative liability is compliance with international obligations. However, administrative law in its repressive nature is equated to criminal law,⁸³ as well as, according to the case law of the ECtHR, the state has an obligation to ensure the guarantees of the criminal process if the imposed administrative penalty is of a criminal nature.⁸⁴

Another solution is to establish criminal liability for repeated acts of receiving/giving gifts. E.g., when only administrative liability had been established for neglect of animals, to combat persistent violations it was proposed to “apply criminal liability for persons who are punished two or more times with administrative liability for such violations.”⁸⁵ Similar provision is necessary when establishing administrative liability for gifts in the healthcare sector as it would ensure Lithuania’s commitment to international obligations.

Another question is the definition of a symbolic gift. Considering the case law,⁸⁶ gifts of small value (e.g., coffee, sweets, alcohol, etc.) are usually considered symbolic, but money (10–20 euros) is equated to a bribe. However, small amounts of money usually can do the same harm to public interest as other symbolic gifts. Nevertheless, recognizing money as a gift might cause problems in distinguishing the demand for a bribe from its giving at the initiative of patients. Firstly, since people usually carry a certain amount of money, it is easier for a doctor to demand a bribe in money than in other objects. Secondly, small sums from many patients can constitute a significant addition to the official salary. However, it is more difficult to realize specific gifts, e.g., many boxes of chocolate. Finally, money is associated with wages, but a box of sweets or a packet of coffee is more associated with a symbolic gift rather than with a remuneration.⁸⁷ Hence, when establishing an administrative liability, even a small amount of money should not be considered a gift.

Finally, the application of legal liability always deals with the consequences of corruption but rarely with the causes. However, effective prevention of corruption should first eliminate the causes that lead to the creation of a corrupt environment. For this purpose, further in-depth qualitative surveys are required to reveal why people give gratitude gifts to workers of the healthcare system. The results would make it possible to determine the real causes of informal payments in the

83 Ibid., p. 15.

84 VALANČIUS, Virgilijus, NORKUS, Rimvydas. Aspects of Contact of Administrative and Criminal Justice in Lithuania. *Jurisprudencija*, 2006, vol. 82, no. 4, p. 94–95; Council of Europe, Committee of Ministers. Recommendation no. R (91) 1, 1991; ECHR (1950, ETS 5), art. 6.

85 SAKALAUSKAS, Gintautas, BIKELIS, Skirmantas, KALPOKAS, Vaidas, POCIENĖ, Aušra. *Criminal Policy in Lithuania: Trends and Comparative Aspects*. Vilnius: Law Institute of Lithuania, 2012, p. 101; Draft Law on Supplementing Article 250(2) of the Criminal Code of the Republic of Lithuania, 2001, no. IXP-342(2SP).

86 See 1. Introduction.

87 LATINYTĖ, Rūta. *Gift-giving as an expression of interpersonal relations in everyday practices in Lithuania at the end of the 20th – beginning of the 21st century*. Doctoral thesis, Vilnius University, Vilnius, 2022, p. 110, 124.

healthcare system, the identification of which would contribute both to combating the consequences and, in the context of proportionality, to ensuring the solution of the problem by promoting anti-corruption awareness instead of applying legal liability.

5 Conclusions and Recommendations

The examination of the concept of proportionality revealed in the doctrine of the Constitutional Court of the Republic of Lithuania, the jurisprudence of the Supreme Court of Lithuania, and the scientific doctrine allows to conclude that the essence of this principle is the conformity of the chosen means with the goals pursued. An additional analysis of the content of this principle in the context of utilitarianism and retributivism made it possible to distinguish these important elements of proportionality:

- a) the balance of benefits to society / harm to the offender,
- b) the effectiveness of the measures,
- c) the compliance of the measures with the principle of justice (implementation of retribution, not revenge),
- d) the basis of proportional punishment – the dangerousness of the violation and of the offender.

The evaluation of the application of criminal liability for gratitude gifts in the healthcare system in the context of a fair criminal policy allows to conclude that the application of criminal liability for receiving or giving symbolic gifts of gratitude in the healthcare system contradicts the principle of proportionality.

Ultimately, recommendations are made to establish alternative types of legal liability for gifts in the healthcare system in Lithuania, ensuring a more proportionate legal assessment of the actions in question:

- a) to establish disciplinary liability for doctors for receiving symbolic gifts of gratitude (secondary option); or
- b) to establish administrative liability for both patients and doctors for giving/receiving symbolic gifts of gratitude, also making it possible to move to the application of criminal liability in case of repeated acts (priority option).

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