Intensive supervision and protection of human rights: symptoms of the panopticon

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Abstract

The article provides the analysis of the concept of intensive supervision as one of electronic monitoring forms and as one of the origins of measures of constraint in the Republic of Lithuania, as well as of the problems of its regulation and application. Based on the European Court of Human Rights case law, constitutional jurisprudence, judicial practice and scientific doctrine, the article deals with the compliance of this measure of suppression with the principles of equality of rights, honor and dignity, as well as with the place of intensive supervision in the system of other measures of constraint.

Keywords*: electronic monitoring, procedural coercive measure, measure of constraint, intensive supervision*

1. Introductory remarks

As is provided in Article 5 of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter – the Convention), everyone has the right to liberty and personal security. The Convention has been ratified, firmly believing in the fundamental freedoms enshrined therein, which are the basis of justice and peace, and which, as is envisaged in the preamble to the Convention, are best protected by effective political democracy and general understanding and respect for human rights. It is obvious that personal freedom is a constitutional value, which, however, may be restricted in cases provided by law.

The criminal process is one of those areas in which the rights and freedoms of a person may be restricted, but this must be done proportionately and in compliance with other criteria that legitimize such constraints. Nowadays, the measures of constraint, based on information technologies and allowing the remote monitoring of suspects and accused persons in order to ensure the progressiveness of the criminal process, are being implemented in the criminal process. Tracking of a person with the help of electronic means at a distance makes it possible not to restrict personal freedom physically. On the other hand, a glance at the past and the present forces to raise the

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questions whether it is really so that the implementation of information technology innovations in criminal justice in the area of measures of constraint not only strengthens the protection of human rights and modernizes the process, but also creates preconditions for "smart" technologies not to restrict such human rights as the right to be forgotten, the right to be invisible etc. Or, maybe, on the contrary, intensive supervision of a person as a measure of constraint is only seemingly a step forward.

Thus, the relevance of this article is related to the emergence of a comparatively new measure of constraint in Lithuania, i.e. of intensive supervision, in the criminal process. Even then, when the possibility to impose intensive supervision emerged, the courts of the Republic of Lithuania did not apply this measure in practice for more than one year[3]. This encourages to think over and discuss why the innovative tools are being applied reluctantly, perhaps, too cautiously, why they cause doubts and fear. The authors analyze the compatibility of intensive supervision with the principle of equal rights and the principle of protection of honor and dignity.

The purpose of this article is not to provide a complete definition and concept of intensive supervision. The article does not identify all possible problems and shortcomings in the application and regulation of this measure of constraint. The authors are looking for the answers to the questions raised in the article that are related to the compliance of intensive supervision with the aforementioned constitutional principles.

The purpose of the article is to reveal the problems of regulation and application of the procedural coercive measure that is being analyzed. The historical, linguistic, logical and systematic analysis methods of scientific research are used for achieving this purpose.

2. Genesis of intensive supervision: historical retrospective

Relatively recently the legislator of the Republic of Lithuania has made a step that is significant for the criminal process – it supplemented the Code of Criminal Procedure of the Republic of Lithuania (hereinafter – the CCP)[4] with one more measure of constraint, which is attributed to the types of the procedural coercive measure, i.e. intensive supervision, the application of which had to be officially started from the 1st of January 2015[5]. Thus, electronic monitoring of suspects and accused persons, also known as intensive supervision, started to be applied in Lithuania.

When looking from the point of view of the historical perspective, it can be noticed that the sources of electronic monitoring in Lithuania can be found already approximately in the XVth century. Of course, it is not even worth talking about the criminal process ongoing with the help of modern means in those times, however, it is important to note that in some way it is already possible to find the legal provisions,

[3] Data on the persons registered with the pre-trial investigation institutions, who are suspected (charged) with criminal offenses (form_30-itj): https://www.ird.lt/lt/paslaugos/nusikalstamu-veiku-zinybinio-registro-nvzr-paslaugos/ataskaitos-1/nusikalstamumo-ir-ikiteisminiu-tyrimu-statistika-1/view_item_datasource?id=1554&datasource=4665&page=16.

[4] Criminal Code of the Republic of Lithuania. Valstybės žinios (Official Gazette). 2000, Nr. 89-2741.

[5] Law on amending and supplementing Articles 71, 75, 120, 121, 126, 132, 139, 179, 183, 218, 219, 233, 236, 261, 273, 279, 285, 286, 317, 319, 426, 427, 428, 429, 432 of the Code of Criminal Procedure of the Republic of Lithuania and on supplementing the Code with Articles 131-1, 430-1. Valstybės žinios (Official Gazette). 2013, No. 75-3769.

valid at those times, which were directly or indirectly related to tracking of the prosecuted persons in order to ensure their participation in the legal process.

For example, one of the first sources of criminal law and criminal procedure law is in the Lithuanian law, i.e. Kazimieras' Acquis of the year 1468 as the most ancient Acquis of the feudal Lithuanian State, which is hardly accessible for researchers and students[6]. Kazimieras' Acquis, valid throughout the Grand Duchy of Lithuania until the adoption of the first Statute of Lithuania in the year 1529, included criminal, civil, administrative and procedural law[7]. The rudiments of variations of one of the forms of electronic tracking, i.e. intensive supervision, can be found in this source. Article 11 of this Acquis provides: "(...) if any person of the duke, lord or boyar has a matter to people of the duke, lord or boyar, so the one, who is searching for the truth, should go to the lord [of the person being accused] to seek the truth; but if the lord fails to establish the truth, then the common court, setting the deadline for both parties, [will have to] be held and the truth is to be established. If again any of them does not come [wastes the time], then we shall appoint a dietsky[8], whereas if we are absent from the Grand Duchy of Lithuania [at that time], then our voivodes can appoint the dietsky"[9]. This provision suggests that, in cases where the culprit avoided the legal proceedings, the dietsky had to bring such a person to court. This word of Slavic origin does not have a Lithuanian equivalent. The dietsky, when performing his functions to bring a person avoiding the criminal proceedings to court, had to find the latter and track him physically. Kazimieras' Acquis contains a number of provisions allowing to conclude that the persons, spies, whose duty was to find, track a culprit and ensure the participation of such a person in the proceedings, used to be hired in order to ensure the participation of the culprit in the criminal proceedings. Here, Article 16 of Kazimieras' Acquis provides that "If a thief, who was tracked down by spies, is delivered and, being tortured, confesses that he has stolen, has been stealing earlier and paying fines and the neighborhood was aware of it, then such a person should be hanged without a steal"; Article 17 provides that "if a spy tracks down someone, but the steal is missing, and the person has stolen for the first time, whereas the neighborhood has not seen thefts and he has paid no one for theft yet, then he must pay the plaintiff for theft and the fine – to the court, and it is not necessary to sentence him to death"; Article 24 stipulates that "If the one, who takes out the people or constrained family, is caught with a steal [when leading the people], then such one deserves the gallows; whereas if he is tracked down by a spy, he will face such a truth as is above written in this scripture, he will be judged based on it"[10].

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[6] J. Jurginis, *Kazimieras' Acquis (year 1468). Introduction. Kazimieras' Acquis (year 1468)*, prepared by Jurginis, J., Janulaitis, A., Vilnius: Mintis, 1967, pp. 1, 3.

[7] A. Janulaitis, *Basic Knowledge of Acquis. Kazimieras' Acquis (year 1468)*, prepared by Jurginis, J., Janulaitis, A., Vilnius: Mintis, 1967, p. 9.

[8] The Dietsky Institute came into existence in Kievan Rus, after the latter split and the Slavic lands were annexed to Lithuania; the Institute became a part of the feudal state of Lithuania. The term "dietsky" (dieckij, dietskij) of Slavic origin was mentioned in the Grand Duchy of Lithuania in the Land privilage of the year 1447 and in Kazinieras' Acquis in the year 1468. These are the first general State normative acts of the GDL, which refer to the Dietsky Institute. The Dietsky was a court official. By ordinance of the judge, he used to summon a person to court, to arrest the accussed persons and bring them to court, he used to order the lien, to execute court judgments and perform other assignments of the judge. The origin of the Dietsky and Vizh Institutes: http://www.antstoliurumai.lt/index.php?id=1917.

[9] *Kazimieras' Acquis (the year 1468)*, prepared by Jurginis, J., Janulaitis, A., Vilnius: Mintis, 1967, p. 17.

[10] See also 12, pp. 18-19.

Thus, it is obvious that the process of tracking a culprit was taking place already in the fifteenth century, only it was carried out directly by natural persons physically, visually, in a way that was possible in those days. There was a risk of not finding a culprit. Judging from the provision of Article 22 of Kazimieras' Acquis, according to which "(...) If any of those two litigants does not come, he is guilty without any trial, whereas the one, who has come, to adjudge [in his favor] what he is looking for"[11], it can be assumed that, having failed to secure the participation of a culprit in court, he would be acknowledged as guilty without any trial. All this allows to assume that, although electronic monitoring devices were invented in the XXth century, the rudiments of the newest measure of constraint, i.e. of intensive supervision, are rooted much earlier – in the XVth c.

Here, the information, according to which the very idea of electronic monitoring, as we understand it today, was purified for the first time and developed in the XXth c. in the United States of America, can be found in the sources of law history of the latest times. Although the exact date of the emergence of the idea of this monitoring tool is debatable, some authors stick to the position that this tool was developed for the first time in the state of New Mexico in the city of Albuquerque in the year 1977. The judge Jack Love sought to come up with a method to control the persons, who occurred in the field of vision of the prosecuting authorities, in their own homes, not in prisons. The electronic anklet idea occurred to him when watching the Spider-Man comic strip of 1977[12]. The villain followed up the hero using an electronic monitoring bracelet in the aforementioned Spider-Man cartoon[13]. Other sources mention that the first electronic device for tracking offenders remotely was invented in the year 1960 by twin brothers Ralph and Robert Schwitzgebel, who were master students of the Harvard University, who worked with Timothy Leary and BF Skinner. The brothers created a device that was remotely operated by radio waves – a band for monitoring juvenile offenders[14]. A tangible device for electronic monitoring has crystallized out in the United States of America.

Electronic monitoring is a general term covering a number of monitoring technologies and methods available for use in the criminal justice[15]. Electronic monitoring is described in scientific sources as a tape attached to the wrist or ankle that sends signals to the receiver that is in the phone at home[16], as well as a system of home confinement, the purpose of which is to monitor, control and modify the behavior of offenders[17].

L. Zedner calls electronic bracelets and anklets a modern-day electronic equivalent to the ball and chain and the source of stigma in society[18]. One has to admit that this observation is appropriate. As regards the Chatelet legal practice within the years 1755-1785, the exile for the then committed severe crimes made more than half of the

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[11] See also 12, p. 18.

[12] See: https://www.nytimes.com/1984/02/12/us/electronic-monitor-turns-home-into-jail.html.

[13] L. Zedner, *Criminal Justice*, Oxford: Oxford University Press, 2004, p. 220.

[14] M.M. Feeley, *Entrepreneurs of Punishment: How Private Contractors Made and Are Remaking the Modern Criminal Justice System – An Account of Convict Transportation and Electronic Monitoring*, Criminology, Criminal Justice, Law & Society, 2016, p. 12.

[15] See: https://www.iriss.org.uk/sites/default/files/2017-11/insights-40_0.pdf.

[16] See also 13, p. 220.

[17] J. Ardley, *The theory, development and application of electronic monitoring in Britain*, Internet Journal of Criminology, 2005, p. 1.

[18] See also 13, p. 221.

sentences imposed; most of those sentences were accompanied by additional punishment with the torture dimension, i.e. also an iron anklet, which, to a certain extent, reminds of anklets being worn nowadays, was next to the deck, shame pole, stigma and whip[19]. Critics would probably say that a culprit, who is subjected to intensive supervision, is given the opportunity to be free. On the other hand, it is unclear how much a person, who wears a clearly visible electronic device, by which he is monitored not only by officers carrying out intensive supervision, but also by the whole public, is free.

The wearing of anklets or bracelets, when a person is staying under intensive supervision, has certain symptoms of the Panopticon. Let's recall Jeremy Bentham's Panopticon – a perfect prison: "The structure is oval, a tower rises in its center, from which all solitary cells glassed from the outside are visible. Each individual is reliably closed in a solitary cell straight before the supervisor's eyes. The supervisor can watch him constantly, whereas the prisoner sees neither the supervisor, nor his neighbors, because the side walls prevent him from seeing them (Bentham 2003: 4-5)"[20]. Moreover, the public that can easily get there can see individuals (and the supervisor as well) at any time[21]. The authorities start to function automatically in the Panopticon, so that the imprisoned individual would feel being constantly monitored. He does not know at what moment he is being monitored, but he is sure that this can happen at any time[22]. The individuals, who are monitored within twenty-four hours, during day and night, who have no personal space, are dehumanized, by negating any intimacy and personalism[23]. The individual, who is subjected to the measure of constraint, i.e. intensive supervision, becomes visible not only to the supervising officer, but also to the public that sees an electronic monitoring device on his body while the person is wearing it. The individual wearing an anklet or bracelet is always watchable by the public: when resting at the seaside, when searching for the job and, in general, when visiting public places.

3. Concept of the measure of constraint, i.e. of intensive supervision, in Lithuania

As is provided in part 1 of Article 131[1] of the CCP, intensive supervision is considered to be the control of a suspect with the help of electronic monitoring devices. This measure is sanctioned at the pre-trial investigation stage by the pre-trial investigation judge, whereas, after passing the case to the court, intensive supervision is sanctioned by the court hearing the case. The term for the application of this measure is determined by the pre-trial investigation judge or by the court ruling. For the first time, intensive supervision can be imposed maximum for the 6-months' period. Part 4 of Article 131[1] of the CCP provides the possibility to extend the period of application of this measure of constraint up to 3 months and does not limit the number of extensions. The CCP establishes the prohibitions to remove, break or otherwise destroy the electronic

[19] M. Foucault, *The Disciplined and Punished.Birth of a Prison*, Vilnius: Baltos lankos, 1998, p. 42.

[20] J. Barevičiūtė, *Panopticon and Panopticism in the Context of Globalization*, Problemos, 2004, 66:93.

[21] See also 19, p. 245.

[22] See also 19, p. 238.

[23] See also 20, p. 97.

monitoring device (Part 7 of Article 131[1] of the CCP). It also establishes the duties of suspects and accused persons to wear the electronic monitoring device and to comply with the established order of the day (Part 7 of Article 131(1) of the CCP). In the event of breach of these duties, arrest may be imposed, if that is the case.

The whole of the above-mentioned provisions of the CCP makes it possible to conclude that the procedural form of intensive supervision, as an independent measure of constraint, is adopted in Lithuania, though actually there were discussions on the issue of its independence when preparing a draft law on amending and supplementing Articles 71, 75, 120, 121, 126, 132, 139, 179, 183, 218, 219, 233, 236, 261, 273, 279, 285, 286, 317, 319, 426, 427, 428, 429, 432 of the Code of Criminal Procedure of the Republic of Lithuania and on supplementing the Code with Articles 131[1] and 430[1].

Discussions on the aspects of independence of intensive supervision had been going on at the Ministry of Justice of the Republic of Lithuania already in the course of making these amendments. The representatives of one group asserted that intensive supervision should be seen as an independent measure of constraint. According to the representatives of the other group, intensive supervision could only be seen as one of the elements ensuring the application of other existing measures of constraint. As the representatives of this group asserted, currently there is an optimal number of procedural coercive measures (the list) in the Lithuanian criminal procedure, capable of ensuring the purpose of the Institute of measures of constraint. If to optimize and modernize the system of measures of constraint, then this should be done not by increasing the list of these measures, but by improving the conditions, criteria and mechanism of certain already existing measures of constraint. The representatives adhered to the point of view that the provisions of the criminal procedure containing abusive provisions and measures, resemble a model of the etatist State under the rule of law, in which the state-sanctioned supervision and control prevail. Thus, unlike the civil State under the rule of law, the latter is focused not on the content, but on the form. Finally, the representatives of the third group adhered to the interim or, in other words, submissive position. They asserted that intensive supervision can be both an independent measure and a measure helping to ensure the effective realization and observance of the measures that are milder than arrest. Thus, it seems that the legislator accepted the opinion of the representatives of the first group regarding intensive supervision as a measure of constraint, which is independent, autonomous from other coercive measures and significant in the system of these measures. It is also noteworthy that the law does not prohibit to impose intensive supervision together with the other measures of constraint. Article 121 of the CCP, which regulates the general provisions for imposing measures of constraint, provides for that several measures of constraint that are milder than arrest may be simultaneously imposed (Part 3 of Article 121 of the CCP).

Although the list of measures of constraint, based on the stringency scale, is not provided in part 1 of Article 120 of the CCP, but, in terms of the legal technique, one might think that, according to stringency, intensive supervision is singled out as a separate measure of constraint, ranked second after arrest being the most stringent measure of constraint. The legislator attributes it to the similar stringency level as arrest is, because it requires a sanction of the judiciary (Part 1 of Article 121 pf the CCP). Intensive supervision, like other measures of constraint, is regulated by a separate Article 131[1] of the CCP.

One can only guess why intensive supervision has not been imposed by courts for more than 1 year. *Quot capita, tot sensus* ("As many heads, so many minds"), often paraphrased into "as many heads, so many opinions" – a Roman poet Horace would say. If, in general, measures of constraint are imposed in accordance with the CCP in order to ensure the participation of the suspect, accused or convicted person in the process, unhindered pre-trial investigation, court proceedings and execution of the judgment, as well as in order to prevent new criminal offences, so sluggish imposing of intensive supervision may be related to the doubt to ensure an unhindered criminal process. In other words, there may be doubts as to whether a person subjected to electronic monitoring will not escape or hide. In case of arrest, the possibilities for a person to flee and hide are mostly constrained, he is always in sight of law enforcement officers, unlike in case of electronic monitoring. However, custodial measures are the most stringent, and they should be used, if there are respective grounds. As is repeatedly stated in the doctrine of the European Court of Human Rights (hereinafter – the Court), an individual's right to freedom protected by Article 5 of the Convention is an extremely important value in the democratic society (*De Wilde, Ooms and Versyp v. Belgium, 18 June 1971, § 65, Series A No. 12, and Winterwerp v. the Netherlands, 24 October 1979, § 37, Series A No. 33 Medvedyev and others v. France, 29 March 2010, § 76, No. 3394/03*). All persons have the right to protection of this right and no one shall be deprived of his/her liberty in violation of the provisions of the Convention (*Weeks v. the United Kingdom, 2 March 1987, § 40, Series A No. 114*). Electronic monitoring, in contrast to arrest, does not, in the physical sense, take away freedom, although it limits it. Thus, the application of this measure implies a lower degree of limitation of freedom for a person. It may be the case that the new measure of constraint causes doubts as to its effectiveness for law enforcement entities. On the other hand, the provisions of the CCP allow to impose a complex of measures of constraint on a person. Of course, the CPC neither imperatively foresees it, nor consolidates such combinations of complexes. This is left to the law applying entities.

The authors of the article tend to adhere to the position that intensive supervision should have been established in the CCP, not as an independent measure of constraint, but as an integral part of the mechanism of measures of constraint. However, the other way to go was chosen, i.e. to expand the list of sufficiently abundant measures of constraint by supplementing it with one more measure of constraint. In other words, the application of state coercion has been further expanded. The more coercion is, the more you want to expand it. Thus, the preconditions for the "panopticon" syndromes to manifest themselves can be created in the Lithuanian process. If we look at the Court's jurisprudence, we would notice that the Convention obliges the States to seek balance between the ensuring of the public and State security and the use of coercion against persons. As is acknowledged in the Court doctrine, the States have certain obligations regarding the protection of persons' rights. Moreover, the States are responsible for violations of the rights guaranteed by the Convention. The excessive State coercion, overshadowing the rights guaranteed by the Convention, can endanger the democratic State principle[24]. Although the States have discretion as to the use of procedural coercive measures in the national law, nevertheless, they must implement discretion in accordance with the European law[25]. The use of State coercion must be lawful and

[24] *Suheyla Aydin v. Turkey*, 24 August 2005, § 152, 158, 161, No. 25660/94.
[25] *Szabó and Vissy v. Hungary*, 12 January 2016, § 57, No. 37138/14.

proportionate, based on the honest belief that there are appropriate, well-grounded reasons at that time for the use of coercive measures[26], as is thought, among them – also the coercive measures that are introduced and augmented in the national law.

4. Intensive supervision in the context of the principle of respect for human honor and dignity and the principle of equality

A modern-day electronic equivalent to the ball and chain is one of the critical definitions of intensive supervision that is found in science[27]. In addition to the benefits, this measure of constraint causes concern for some scientists because of contradiction of this measure with the constitutional principles. The ball and chain on the human body, as the author L. Zedner says, resembles an iron collar that was worn by offenders in the XVIIIth c[28]. The obvious difference between the ball and chain & iron collar and the anklet worn when staying under intensive supervision is their wearing time. The chain was worn in approximately the XVIIIth c., maybe earlier, whereas anklets are worn in the XXIth c. We write in scientific works in that XXIth c. that the core of constitutionalism of democratic States is the theoretical recognition of the priority of human rights and freedoms and their legal consolidation[29]. A person, wearing such vivid attributes as the chain, anklets and bracelets becomes visible to all people that look at him at that time. Or that do not look at him, but it may seem for the person, who wears a chain or anklet, that all people look at him, that they know for what he wears an anklet, that they evaluate him from the negative side. This constantly accompanying feeling that you are being watched reminds of something. It reminds of what was already before, having perfection and anti-humanity at the same time – the Panopticon.

The Panopticon is defined by scientists, who are interested in this topic, as a perfect prison. As was previously mentioned, it was an oval construction with a tower in the center, from which all solitary cells glassed from the outside were visible. Individuals were reliably closed in solitary cells; they were straight under the supervisor's eyes. He could constantly watch the individuals, whereas the latter could see neither the supervisor, nor their neighbors, because of the side walls, which prevented them from seeing each other[30]. Any member of the public could see the prisoners at any time[31]. "Visible, but does not see; the object of information, but never the subject of communication. Visible from the central tower, but not visible from solitary cells that are strictly separated by partitions"[32]. Perhaps, the Panopticon can be called a perfect prison from the architectural aspect, when the space is planned in the form of such a model, in which solitary cells are perfectly observed from one point, i.e. from the tower, whereas for those, who are located in solitary cells, neighbors remain invisible, except for the tower. On the one hand, although you see a tower, you do not know if you are being watched by the supervisor. You can clearly see only the public that came, as if to

[26] See also 24.
[27] See also 13, p. 221.
[28] See also 19, p. 42.
[29] A. Taminskas, G. Mesonis, *Human Dignity: Constitutional Reflections*, Jurisprudencija, 2014, 21(4): 970.
[30] See also 20, p. 94.
[31] See also 19, p. 245.
[32] See also 19, pp. 237-238.

the circus, to see the Panopticon and its inhabitants. It should not be forgotten that the inhabitants of cells had to be able to see not the prisoners in close vicinity, but the prisoners staying in cells before their eyes, because the cells were made of glass and the Panopticon was oval. The imprisonment in the Panopticon meant constant tension, whether you are supervised by the supervisor and other prisoners. This, in turn, limited personal space, freedom to stay alone and to behave as you wish, intimacy, and finally – routine life and peace. Therefore, as scientists aptly note, there is no longer a place for the concept of an individual in the Panopticon, only the concepts of a dehumanized individual and transient[33], since the individuals in solitary cells have become, as a matter of fact, mere objects of observation.

These memories encourage the desire to look at the anklet that is worn when staying under intensive supervision. The fact that an anklet is visible, since it is worn on the human body, encourages to discern the similarity. It becomes visible not only to the law enforcement officers, who as if resemble the tower supervisor, but also to the whole community, which could watch the Panopticon at any time. Yet, in the case of the Panopticon, individuals were dehumanized, so there is no background for talking about their dignity. This causes doubts as to whether the anklet that is worn does not violate the person's honor and dignity.

According to Article 3 of the Convention, no one shall be subjected to torture or to inhuman or degrading treatment or punishment. The Court, when developing the doctrine of human dignity, explains that Article 3 of the Convention enshrines one of the most fundamental values of democratic society[34]. It prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the circumstances and the victim's behavior[35]. Ill-treatment must attain a minimum level of severity, if it is to fall within the scope of Article 3. The assessment of this minimum is relative: it depends on all the circumstances of the case, such as the nature and context of the treatment, its duration, and its physical and mental effects and, in some instances, the sex, age and state of health of the victim. Treatment has been held by the Court to be "inhuman", because, *inter alia*, it was premeditated, was applied for hours at a stretch and caused either actual bodily injury or intense physical and mental suffering[36]. Treatment has been considered "degrading" when it was such as to arouse in its victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance[37]. In order for a punishment or treatment associated with it to be "inhuman" or "degrading", the suffering or humiliation involved must in any event go beyond that inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment[38].

As is provided for in part 4 of Article 18 of the Constitution of the Republic of Lithuania (hereinafter – the Constitution), the law and courts shall protect everyone from arbitrary or unlawful interference with his private and family life, as well as from

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[33] See also 20, p. 97.

[34] *Labita v. Italy* [GC], No. 26772/95, § 119, ECHR 2000-IV, *Provenzano v. Italy*, No. 55080/13, § 126.

[35] *Iwańczuk v. Poland*, No. 25196/94, § 49, 15 November 2001, and *E. and Others v. the United Kingdom*, No. 33218/96, § 88, 26 November 2002.

[36] *Labita v. Italy* [GC], No. 26772/95, § 120, ECHR 2000-IV.

[37] *Hurtado v. Switzerland*, 28 January 1994, opinion of the Commission, § 67, Series A No. 280, and *Wieser v. Austria*, no. 2293/03, § 36, 22 February 2007, *Durdevic v. Croatia*, 19 July 2011, No. 52442/09.

[38] *V. v. the United Kingdom* [GC], no. 24888/94, § 71, ECHR 1999-IX.

encroachment upon his honor and dignity[39]. The Constitutional Court of the Republic of Lithuania (hereinafter – the Constitutional Court) regards human dignity as a value of particular importance, whereas the purpose of the Constitution in this case is to ensure the protection and respect of this value. These requirements are imposed, first of all, on the state[40]. According to the Constitution, it is possible to restrict constitutional human rights and freedoms, if the following conditions are met: this is done by law; restrictions are necessary in the democratic society in order to protect the rights and freedoms of other persons and the values enshrined in the Constitution, as well as constitutionally important goals; the nature of the rights and freedoms and their essence are not negated by restrictions; the principle of constitutional proportionality is respected[41]. The concept of the democratic State under the rule of law, seeking to preserve and defend as well as capable to protect a person and the society from crimes and other serious violations of the law, which is enshrined in the Constitution, cannot serve as the basis for violating human rights and freedoms, restricting them more than is necessary for the society to achieve important legitimate goals or, by such constraints, to negate the essence of human rights and freedoms[42].

There are authors in the scientific doctrine, who think that electronic monitoring threatens to replace a highly effective form of supervision in the community with technological oversight. The effects of continual surveillance by a remote machine are not yet known, but it may be imagined that this form of observation is ultimately dehumanizing[43]. If we support their point of view, we should say that the devices worn on the legs and arms and meant for electronic monitoring essentially negate the essence of human rights and freedoms. The use of inhuman devices would not be compatible with the above-mentioned jurisprudence, developed by the Court and the Constitutional Court.

According to the authors of this article, it is important to note that there is no list of measures used by the State, which violate the honor and dignity of persons. The clarification of the Constitutional Court that the State, when restricting the rights of a person, must not negate their essence, is important. Also, the Court's clarification that, when assessing the violation of dignity, we must take into account the whole of circumstances, as well as such qualities of a person, to whom the appropriate measures were applied, as the sex, age and state of health of the victim, is very important. The cases, in which the use of electronic monitoring exacerbates the problems with the culprit's health and the courts must decide whether Article 3 of the Convention is violated, occur in practice of the courts. There was a case in the United Kingdom High Court (Administrative), in which the person was suffering from post-traumatic stress disorder and a psychotic illness with auditory hallucinations and paranoid beliefs. Psychiatrists unanimously confirmed in the case that the measures applied by the law enforcement institutions, in particular the monitoring tag, had exacerbated the appellant's symptoms[44]. The court did not establish an infringement of the article in the

[39] Constitution of the Republic of Lithuania. Valstybės žinios (Official Gazette). 1992, No. 33-1014.

[40] Constitutional Court of the Republic of Lithuania 9 December 1998 ruling, No. 2/98.

[41] Constitutional Court of the Republic of Lithuania 19 September 2002 ruling No. 34/2000-28/01.

[42] Constitutional Court of the Republic of Lithuania 29 December 2004 ruling No. 8/02-16/02-25/02-9/03-10/03-11/03-36/03-37/03-06/04-09/04-20/04-26/04-30/04-31/04-32/04-34/04-41/04.

[43] See also 13, p. 222.

[44] See: https://www.ejiltalk.org/the-role-of-legitimacy-and-proportionality-in-the-supposedly-absolute-prohibition-on-inhuman-and-degrading-treatment-the-united-kingdoms-high-court-decisions-in-dd-v-secretary-of-state/.

mentioned case. This is one of the cases, in which the definite circumstances were assessed and it had to be decided whether the applied State coercive measure negates the essence of the rights and freedoms of a person and thereby violates his honor and dignity. Currently the authors of the article are staying in scientific research, therefore they cannot provide a clear position whether the electronic monitoring measure is inhumane. However, it is to be held that in such cases where the application of the electronic monitoring measure causes harm to a person due to his qualities, such as his health, with taking into account the doctrine that was formed by the Court, one may raise the question on the potential inhumanity of the measure applied to a particular person in that case.

The Convention prohibits discrimination. Article 14 of the Convention provides the enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status. The Court, when developing the equality doctrine, explains that Article 14 complements the other substantive provisions of the Convention and its Protocols. It has no independent existence since it has effect solely in relation to the "enjoyment of the rights and freedoms" protected by those provisions. The application of Article 14 does not necessarily presuppose the violation of one of the substantive rights guaranteed by the Convention. It is necessary, but it is also sufficient for the facts of the case to fall within the ambit of one or more of the relevant provisions. The prohibition of discrimination in Article 14 thus extends beyond the enjoyment of the rights and freedoms, which the Convention and its Protocols require from each State to guarantee. It also applies to those additional rights falling within the general scope of any Article of the Convention, for which the State has voluntarily decided to provide it[45]. Moreover, in order for an issue to arise under Article 14, there must be a difference in the treatment of persons in analogous, or relevantly similar, situations (see D.H. and *Others v. the Czech Republic* [GC], No. 57325/00, § 175, ECHR 2007-IV, and *Burden v. the United Kingdom* [GC], No. 13378/05, § 60, ECHR 2008). Such a difference in treatment is discriminatory if it has no objective and reasonable justification; in other words, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realized[46]. The Court has also held that not every difference in treatment will amount to the violation of Article 14. It must be established that other persons in an analogous or relevantly similar situation enjoy preferential treatment and that this distinction is discriminatory[47]. A difference of treatment is discriminatory if it has no objective and reasonable justification; in other words, if it does not pursue a legitimate aim or if there is no reasonable relationship of proportionality between the means employed and the aim sought to be realized[48].

According to Article 29 of the Constitution, all persons shall be equal before the law, courts, and other state institutions and officials. Human rights may not be restricted; no one may be granted any privileges on the grounds of gender, race, nationality, language, origin, social status, belief, convictions, or views. The Constitution Court ruled that the

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[45] *Carson and Others v. the United Kingdom* [GC], No. 42184/05, § 63, ECHR 2010, *Stummer v. Austria*, 7 July 2011, No. 37452/02, § 81.

[46] *Carson and Others v. The United Kingdom*, 16 March 2010, No. 42184/05, § 81.

[47] *Ünal Tekeli v. Turkey*, No. 29865/96, § 49, ECHR 2004-X,

[48] *Konstantin Markin v. Russia*, 22 March 2012, No. 30078/06, § 125.

constitutional principle of equality of all persons, which must be observed both when enacting and applying laws, as well as when applying laws and administering justice, obliges to legally treat the same facts in the same way and prohibits, in principle, to treat arbitrarily the same facts differently. The constitutional principle of equality of all persons means the natural right of a person, who must be treated equally with others, it establishes the formal equality of all persons and that persons cannot be discriminated or that they cannot be granted privileges. The constitutional principle of equality of all persons to the law would be violated, if a certain group of persons, to whom the rule of law is applied, if compared with the other addresses of the same rule of law, would be treated differently, although there is no difference of such nature and scope between those groups, so that such unequal treatment would be objectively justified[49].

There are authors in the scientific field who have doubts about the principle of the compliance of electronic monitoring with the principle of equality. Electronic monitoring requires a stable home address, a telephone line, and that the offender can continue to meet the costs of its rental and that of the monitoring device. The author states that for the many offenders who fail to meet these basic criteria, electronic monitoring will not be possible if they are liable to be imprisoned instead, even though to do so breaches the principle of equal treatment[50].

Although intensive supervision in Lithuania is a sufficiently new measure of constraint, it is worth sharing this experience as well. The CCP does not provide that a person, who is subjected to intensive supervision, must have a place of residence or the like. This issue is regulated in detail at the sub-statutory level. The intensive supervision and control rules stipulate that an official of the territorial police institution visits the place of residence of a person, who is being controlled, where he gets convinced whether there are technical possibilities (electricity, mobile communications, etc.) to install a stationary electronic monitoring device and ensure its operation. If follows thereof that the application of the measure of constraint, i.e. of intensive supervision, depends to a certain extent on a person's social status. There is no possibility to control a person, who does not have a permanent place of residence or lives without amenities, such as electricity, when applying intensive supervision. It is worthwhile to draw attention to the fact that the practice of taking into account also the family status of the accused, his permanent place of residence, labor relationships, state of health, previous convictions, contacts abroad, as well as the severity of the crime, the severity of the imminent punishment, is formed in the courts of Lithuania, when imposing intensive supervision[51]. In other words, those circumstances that are usually evaluated when dealing with the issue of imposing the arrest or extending its term are taken into account. It has been mentioned that the CCP does not foresee what circumstances should be considered when imposing intensive supervision, but they are introduced and crystallized in case law. Therefore, we cannot categorically state that the application of this measure of constraint in Lithuania is related exclusively to the social status. However, one must agree that the cases, where the measure of constraint cannot be absolutely applicable to a relevant group of persons solely because of their social status, would cause doubts as to the potential violation of the principle of equality.

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[49] Constitutional Court of the Republic of Lithuania 3 July 2012, No. 54/2010, 13 December 2004, No. 51/01-26/02-19/03-22/03-26/03-27/03.

[50] See also 13, p. 221.

[51] Order of the Court of Appeal as of 14 May 2018 in criminal case No.1S-122-202/2018.

5. Final remarks

1. The sources of law history of modern times testify to the fact that the electronic monitoring measure appeared in the XXth century in the United States of America; however, the rudiments of appearance of this measure are found in the most ancient sources of law of the Grand Duchy of Lithuania of the XVth century.

2. Intensive supervision is established as an independent measure of constraint in the criminal procedure of the Republic of Lithuania. If this this measure has been enshrined as an integral part of the mechanism for imposing measures of constraint, it would be possible to avoid the expansion of State violence as a result of extending the list of measures of constraint, which is detailed enough.

3. Easily noticeable monitoring devices for intensive supervision cause doubts as to their compatibility with the principle of honor and dignity of a person, and also have symptoms of the "Panopticon". The persons who were serving their sentences in the "Panopticon" were the dehumanized individuals, who became the object of monitoring. The question of whether a constantly visible electronic monitoring device, as if "marking" the person and, thus, singling him out of other members of the society, is humane and not undermining the essence of the right of a person to honor and dignity, is debatable. This question can be raised in several aspects. Firstly, whether such an electronic monitoring device that is applied to a person, who is being controlled, in all cases negates the essence of the right to honor and dignity. Secondly, whether such an electronic monitoring device is applied to a person, who is being controlled, in a particular case in the context of the individual circumstances, such as the nature of application, its duration, physical and mental effect of the application of the measure, and, where appropriate, the sex, age and state of health of the person being controlled.

4. In cases, when intensive supervision cannot be absolutely applied to a certain group of socially impecunious persons because of their social status, the question of the potential non-compliance of this measure with the principle of equality may be raised. In cases, when the legal acts provide for the conditions for the application of intensive supervision that are related to the possession of property welfare, and this measure is applied, in the case-law, not only via the prism of the social status, it is believed that this measure should not violate the principle of equality.

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