https://doi.org/10.22364/iscflul.8.2.20

Kristine Strada-Rozenberga, *Dr. iur., Professor*
Faculty of Law, University of Latvia, Latvia

Janis Rozenbergs, *Dr. iur., Lecturer*
Faculty of Law, University of Latvia, Latvia

CLARITY OF A CRIMINAL LAW PROVISION IN THE CASE LAW OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF LATVIA

Keywords: criminal law, clarity of provisions, the Constitutional Court of the Republic of Latvia, *nullum crimen, nulla poena sine lege*

Summary

The quality criteria for the provisions of criminal law follow from Art. 90 and the second sentence of Art. 92 of the *Satversme* [Constitution] of the Republic of Latvia. A person may be recognised as being guilty and punished only for such actions that have been recognised as being criminal in accordance with law. A person's fundamental right to know his or her rights defines the framework for the legislator's actions because only such a provision that complies with all the quality criteria of a legal provision may be recognised as being a law, i.e., as having been granted legal force. These fundamental rights require the legislator to take special care in drafting legal norms that envisage criminal liability, which is the most severe form of legal liability. The Constitutional Court of the Republic of Latvia has repeatedly engaged in assessing the quality of criminal law provisions. This study provides an insight into the Constitutional Court's approach to reviewing the clarity of criminal law provisions and summarizes the most important findings made by the Constitutional Court regarding this issue.

Introduction

In the area of substantive criminal law, the requirement regarding the foreseeability and clarity of provisions follows from the principle *nullum crimen, nulla poena sine lege* (no crime, no penalty without law). Currently, this principle is validly recognised as being the cornerstone of European criminal law systems, which has been enshrined in Art. 7 of the European Convention for the Protection

of Human Rights and Fundamental Freedoms[1], as well as in national constitutions and criminal laws.[2] The significance of this principle has been highlighted in the case law of the European Court of Human Rights, which has noted that "The guarantee enshrined in Article 7, which is an essential element of the rule of law, occupies a prominent place in the Convention system of protection [...] It should be construed and applied, as follows from its object and purpose, in such a way as to provide effective safeguards against arbitrary prosecution, conviction and punishment"[3]. Within the case law of the European Court of Human Rights, the significance of this principle is determined also by another aspect, i.e., clarity of provisions and foreseeability of their application allow persons to adjust their actions to the requirements of these provisions.[4] A direct correlation exists between the foreseeability of norms and the offender's personal liability. Art. 7 of the Convention provides for a mental element of guilt in the perpetrator's conduct to establish that penalty is to be imposed for such actions.[5]

The *Satversme* of the Republic of Latvia[6] does not refer *expressis verbis* to the principle *nullum crimen, nulla poena sine lege*; however, the words "in accordance with law" in the second sentence of Art. 92 of the *Satversme* encompass also the principle of *nullum crimen, nulla poena sine lege,* i.e., that a person may be recognised as being guilty and penalty can be imposed only for such conduct (actions or failure to act), which has been recognised as being criminal in accordance with law[7]. The respective principle has been given a more detailed legal regulation in

[1] European Convention for the Protection of Human Rights and Fundamental Freedoms. Signed in Rome on 04.11.1950. [in the wording of 01.08.2021.].

[2] Peristeridou Ch. The Principle of Legality in European Criminal Law. Cambridge, Interesentia, 2015, p. 3.

[3] ECHR judgement of 12 February 2008 in Case Kafkaris v. Cyprus (application No. 21906/04), para. 137. Murphy C. C. The Principle of Legality in Criminal Law under the ECHR. European Human Rights Law Review, Vol. 2, 2010. Available: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1513623 [viewed 10.10.2021.].

[4] ECHR judgement of 16 February 2015 in Case Plechov v. Romania (application No. 1660/03), para. 71. ECHR case law research report – Art. 7 The "quality of law" requirements and the principle of (non-)retrospetiveness of the criminal law under Article 7 of the Convention, 2019, p. 9. Available: https://www.echr.coe.int/Documents/Research_report_quality_law_requirements_criminal_law_Art_7_ENG.PDF. [viewed 10.10.2021.].

[5] ECHR Grand Chamber judgement of 28 June 2018 in Case V.I.E.M. S.R.L. and others v. Italy (application No. 1828/06), para. 242, 246. Guide on Article 7 of the European Convention on Human Rights, 2021, p. 13. Available: https://www.echr.coe.int/Documents/Guide_Art_7_ENG.pdf [viewed 10.10.2021.].

[6] The Constitution of the Republic of Latvia. Available: https://likumi.lv/ta/en/en/id/57980-the-constitution-of-the-republic-of-latvia [viewed 10.10.2021.].

[7] Judgment of the Constitutional Court of the Republic of Latvia of 16 December 2008 in Case No. 2008–09–0106, para. 4.2. Available in Latvian: https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2016/02/2008-09-0106_Spriedums.pdf#search=2008–09–0106 [viewed 10.10.2021.].

the Criminal Law[8], i.e., the first[9] and the fourth[10] part of Section 1 "Basis of Criminal Liability", as well as in Section 5 "Time when the Criminal Law is in Force"[11].

The requirement regarding the clarity of provisions follows both from Art. 90[12] and the second sentence of Art. 92[13] of the *Satversme* and the first part of Art. 7[14] of the European Human Rights Convention. The European Court of Human Rights has pointed out that a person should be informed about the actions for the taking of which they should be made criminally liable and punished. A person may obtain this information:

- by studying the text of the legal provision;
- by studying case law (or the court's interpretation of the provisions);
- by taking appropriate legal assistance.[15]

If a person, having studied the practice of applying the legal provision and having used legal assistance to clarify the content of the provision, nevertheless, is "taken by surprise" by being made criminally liable, the clarity and foreseeability of the legal provision is contestable. In such a case, in a democratic state governed by the rule of law, doubts arise as to whether the legal provisions that define the constituent elements of the particular criminal offence comply with the principle that everyone knows their rights and obligations.[16]

Although changes in the scope of legal provisions through interpretation are unavoidable, irrespectively of how clearly and unambiguously they are worded

8 Criminal Law. Available: https://likumi.lv/ta/en/en/id/88966-criminal-law [viewed 10.10.2021.].

9 Only a person who is guilty of committing a criminal offence, that is, one who deliberately (intentionally) or through negligence has committed an offence which is set out in this Law and which has all the constituent elements of a criminal offence, may be held criminally liable and punished.

10 An offence may not be considered criminal by applying the law by analogy.

11 (1) The criminality and punishability of an offence (act or failure to act) are determined by the law which was in force at the time of committing the offence. (2) A law which recognises an offence as not punishable, reduces the punishment or is otherwise beneficial to a person, unless otherwise provided for in the applicable law, has retrospective effect, that is, it applies to offences which have been committed prior to the applicable law coming into force, as well as to a person who is serving a punishment or has served a punishment but regarding whom conviction remains in effect. (3) A law which recognises an offence as punishable, increases the punishment, or is otherwise not beneficial to a person, does not have retrospective effect. (4) A person who has committed a crime against humanity, a crime against peace, a war crime or has participated in genocide, shall be punishable irrespective of the time when such offence was committed.

12 Everyone has the right to know about his or her rights.

13 Everyone shall be presumed innocent until his or her guilt has been established in accordance with law.

14 No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

15 ECHR judgement of 21 October 2013 in Case Del Río Prada v. Spain (application No. 42750/09), para. 79.

16 Separate Thoughts of the Judges of the Constitutional Court Ineta Ziemele and Sanita Osipova in the Case No. 2018-10-0103, para. 3.3. Available in Latvian: https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2018/06/2018-10-0103_Atseviskas_domas.pdf#search=2018–10–0103 [viewed 10.10.2021.].

in a legal act, such further development of law, in broader understanding, should be reasonably foreseeable.[17] Namely, at the time when the respective actions were taken, a person should have had a valid possibility to foresee, if necessary, by availing of appropriate legal assistance, that the understanding (scope of the provision) of the criminal offence develops and that criminal liability might be set for such actions.[18] This can happen if changes in the content of a legal provision have occurred as the result of the gradual development of case law.[19]

Research of the database of judgements delivered by the Constitutional Court of the Republic of Latvia[20] reveals that, in the period from 2008 to 2021, the Constitutional Court has focused on reviewing the clarity of criminal law provisions in four cases. In all these cases, these matters had been submitted for the Constitutional Court's review in connection with constitutional complaints submitted by private persons. And in all these cases the Constitutional Court has established compliance of the contested norms with the *Satversme* of the Republic of Latvia. Judging by the information available in the Constitutional Court's database of rulings, neither courts of general jurisdiction nor the Ombudsman, nor any other subject who, in accordance with Section 17 of the Constitutional Court Law[21] has the right to submit an application regarding initiation of the case, have ever turned to the Constitutional Court to request examination of criminal law provisions from this perspective.

This research summarises the findings of the Constitutional Court regarding the requirements that Art. 90 and the second sentence of Art. 92 of the *Satversme* of the Republic of Latvia advance regarding the clarity of criminal law provisions. The authors will also present their opinion regarding these findings by the Constitutional Court.

1. Criminal law provisions submitted for the Constitutional Court's review

1.1. In Case No. 2008-09-0106

By the judgement of the Constitutional Court of the Republic of Latvia on 16.12.2008 in case No. 2008-09-0106 "On Compliance of Section 230[1] (1) of Criminal Law with the First Sentence of the First Part of Article 7 of the European

[17] ECHR judgement of 11 February 2016 in Case Dallas v. United Kingdom (application No. 38395/12), para. 74.

[18] ECHR judgement of 12 July 2007 in Case Jorgic v. Germany (application No. 74613/01), paras 109–113.

[19] ECHR judgement of 22 November 1995 in Case S. W. v. United Kingdom (application No. 20166/92), para. 36.

[20] Database of rulings of the Constitutional Court of the Republic of Latvia. Available: https://www.satv.tiesa.gov.lv/en/cases/?case-filter-years=&case-filter-status=&case-filter-types=&case-filter-result=&searchtext=Criminal+law [viewed 10.10.2021.].

[21] Constitutional Court Law. Available: https://likumi.lv/ta/id/63354-satversmes-tiesas-likums [viewed 10.10.2021.].

Convention on Human Rights and Fundamental Freedoms and Article 64 and 65 and the Second Sentence of Article 92 of the *Satversme* of the Republic of Latvia"[22] , the contested norm was recognised as being compatible with Art. 64, Art. 65 and the second sentence of Art. 92 of the *Satversme* of the Republic of Latvia, as well as with the first sentence of the first part of Art. 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

The contested criminal law provision is constructed as a blanket norm, it provides for criminal liability for violating regulations on keeping animals if it has caused bodily injury to the victim or caused the victim's death. The submitter of the constitutional complaints had several objections regarding the compliance of this provision with the *Satversme* of the Republic of Latvia, one of which focused also on the clarity of the provision. The applicant had noted that the contested provision provided for liability for violating regulations on keeping animals; however, at the time when the criminal offence had been committed (on 30 April 2005), no Cabinet Regulations that regulated the procedure of keeping animals or the rights of obligations of owners or holders of animals had been in force. The only valid law had been the Animal Protection Law, where the rights and obligations of animal owners had been defined in a very general way. Moreover, this law had delegated the Cabinet to draft several regulations in the area of keeping animals. Since such Cabinet Regulations had not been in force, the applicant expressed the opinion that he had been sentenced on the basis of an unlawful provision of the Criminal Law because it did provide a clear understanding of what kind of actions a person should refrain from in order not to violate other persons' rights and interests.

The Constitutional Court found that the wording used in the contested norm "the keeping of animals regulation" should be understood as a certain rule of conduct (precept), which pertains to the keeping of animals and is included in a regulatory enactment. The guilty person should be made criminally liable in accordance with the contested norm for failure to abide by this precept or for not doing it properly, as the result of which harm has been inflicted upon a person's health. It follows from the system of the Criminal Law that "the concept of "violating regulations" should be understood as cases, where a person violates a rule on conduct (precept) or prohibition included in an external regulatory enactment. Such precepts and prohibitions can be included both in laws and Cabinet Regulations, and in the respective period the Animal Protection Law[23] was in force, para. 3 of Section 5 (2) of which defined animal owners' obligation to ensure that animals do not disturb or threaten human beings. At the time when the offence, with which the applicant is charged, was committed, the practice of applying the contested norm also had evolved. The Department of Criminal

[22] Judgment of the Constitutional Court of the Republic of Latvia of 16 December 2008 in Case No. 2008–09–0106. Available in Latvian: https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2016/02/2008-09-0106_Spriedums.pdf#search=2008–09–0106 [viewed 10.10.2021.].

[23] Animal Protection Law. Available: https://likumi.lv/ta/en/en/id/14940-animal-protection-law [viewed 10.10.2021.].

Cases of the Supreme Court Senate has noted that the concept "the keeping of animals regulations," referred to in Section 230[1] of the Criminal Law is broader than the concept of "Cabinet Regulation", and the Senate holds that the word "regulation" also encompasses the concept of "law""[24].

1.2. In Case No. 2018-10-0103

By the judgement of the Constitutional Court of the Republic of Latvia on 21.02.2019 in case No. 2018-10-0103 "On Compliance of Section 237[1] (2) of the Criminal Law, in the Wording that was in Force from 1 April 2013 to 1 December 2015, with Article 90 and the Second Sentence of Article 92 of the Satversme of the Republic of Latvia and of Sub-para. "e" of Annex 10A905 to the Cabinet Regulation No. 645 of 25 September 2007 "Regulation on the National List of Goods and Services of Strategic Significance", in the Wording that was in Force from 28 November 2009 to 23 January 2014, with the Second Sentence of Article 92 of the Satversme of the Republic of Latvia"[25], the contested norm was recognised as being compatible with Art. 90 and the second sentence of Art. 92 of the *Satversme* of the Republic of Latvia.

This contested criminal law provision is also constructed as a blanket norm, it provides for criminal liability for the violation of the prohibition on the circulation of the equipment, devices or instruments and their components specially designed or adapted for the operational activity measures to be performed by specific methods. Accordingly, the content of this norm had to be clarified by interpreting it in conjunction with the law "On the Circulation of Goods of Strategic Significance"[26] and the Cabinet Regulation of 25.09.2007 No. 645 "Regulation on the National List of Goods and Services of Strategic Significance"[27], the annex of which comprises the National List of Goods and Services of Strategic Significance of the Republic of Latvia. The submitter of the Constitutional Complaint noted that the grammatical wording of the contested Criminal Law provision led to the conclusion that it provided for criminal liability only for the violation of the prohibition on the circulation only of such devices that were intended for taking operational activity measures to be performed by specific methods.

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[24] Judgement of Senate of Supreme Court, Department of Criminal Cases of 4 January 2005 in Case SKK-j-2(679). Available in Latvian: https://at.gov.lv/downloadlawfile/4222 [viewed 10.10.2021.].

[25] Judgment of the Constitutional Court of the Republic of Latvia of 21 February 2019 in Case No. 2018–10–0103. Available in Latvian: https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2018/06/2018-10-0103_Spriedums.pdf#search=2018-10-0103 [viewed 10.10.2021.].

[26] Law on the Circulation of Goods of Strategic Significance. Available: https://likumi.lv/ta/en/en/id/159963-law-on-the-circulation-of-goods-of-strategic-significance [viewed 10.10.2021.].

[27] Regulations on the National List of Goods and Services of Strategic Significance. Available in Latvian: https://likumi.lv/ta/id/163892-noteikumi-par-nacionalo-strategiskas-nozimes-precu-un-pakalpojumu-sarakstu [viewed 10.10.2021.].

Allegedly, it follows from the provisions of the Operational Activities Law[28] that all the measures of operational activities to be performed by specific methods are aimed only at obtaining information, therefore it can be clearly concluded that the contested Criminal Law provision does not include such devices, by which information cannot be obtained and that are intended only for hindering operational measures. It is contended that it cannot be reasonably foreseen that a person would be made criminally liable in accordance with the contested Criminal Law provision for keeping such equipment or device, the intended use of which, i.e., hindering operational measures, is diametrically opposite to the aims of operational measures to be performed by special measures. Also, the legislator had not considered that the contested Criminal Law provision had envisaged criminal liability for violating the prohibition on circulation of devices intended for hindering measures of operational activities. It is said that such understanding by the legislator is proven by the fact that, on 12 November 2015, the law "Amendments to the Criminal Law"[29] was adopted, adding to the constituent elements of crime in the contested norm a direct reference to devices intended for hindering measures of operational activities. Later, similar amendments were introduced also to the law "On the Circulation of Goods of Strategic Significance"[30], including in its Section 5^1 a direct reference to devices intended for hindering measures of operational activities. Moreover, for a person to understand that in order to clarify the content of the contested Criminal Law provision the Cabinet Regulation and the Annex to it should be taken into account, they have to study several other regulatory enactments. An overly complicated structure of a blanket norm like this is said to be incompatible with the quality requirements set for a criminal law provision. The applicant holds that, even with the assistance of a qualified lawyer, it is impossible to conclude that the contested Criminal Law provision provides for criminal liability for violating the prohibition on the circulation of devices intended for hindering measures of operational activities.

In this case, the Constitutional Court found that a person could have ascertained for what kind of activity they could be made criminally liable in accordance with the contested norms, either by interpreting these provisions independently or, if necessary, by receiving appropriate legal assistance. Thus, the contested provisions are sufficiently clear and foreseeable to serve as the grounds for making a person criminally liable. However, it is worth noting that, apparently, such a conclusion by the Constitutional Court was not unanimous since two of

[28] Operational Activities Law. Available: https://likumi.lv/ta/en/en/id/57573-operational-activities-law [viewed 10.10.2021.].

[29] 12.11.2015. Amendments to Criminal Law. Available in Latvian: https://likumi.lv/ta/id/278151-grozijumi-kriminallikuma [viewed 10.10.2021.].

[30] 31.03.2016. Amendments to Law on the Circulation of Goods of Strategic Significance. Available in Latvian: https://likumi.lv/ta/id/281494-grozijumi-strategiskas-nozimes-precu-aprites-likuma [viewed 10.10.2021.].

the Justices chose to add their dissenting opinion[31] to it, criticising this judgement. A closer examination of this difference in opinions will be provided in the next section of this study.

1.3. In Case No. 2019-22-01

By the judgement of the Constitutional Court of the Republic of Latvia on 24.07.2020 in case No. 2019-22-01 "On Compliance of Section 316 (1) of the Criminal Law, in the Wording that was in Force from 2 January 2004 to 31 March 2013, with the Second Sentence of Article 92 of the Satversme of the Republic of Latvia"[32] the contested norm was recognised as being compatible with the second sentence of Art. 92 of the *Satversme* of the Republic of Latvia.

The contested criminal law provision introduces Chapter XXIV of the Special Part of the Criminal Law "Criminal Offences Committed in the State Authority Service" and defines the concept of a public official in the meaning of criminal law. In the wording that was in force from 2 January 2004 until 31 March 2013, this norm provided that representatives of State authority, as well as every person who permanently or temporarily performed their duties in the State or local government service and who had the right to make decisions binding upon other persons, or who had the right to perform any functions regarding supervision, control, investigation, or punishment or to deal with the property of financial resources of the state or local government, were to be considered to be public officials. The amendments to the Criminal Law of 15 May 2014[33] added a reference to the norm that also persons, who permanently or temporarily performed their duties in the State or local government service, including the state or local government capital company, also were to be regarded as public officials.

Persons, who submitted the constitutional complaint were leading officials at a capital company owned by the State and who, as public officials, had been sentenced for bribery, considered that before the aforementioned amendments had been introduced to it, the contested norm had not been sufficiently clear and, therefore, they could not foresee that they could be recognised as public officials in the meaning of the contested norm because of their leading position at the state capital company. Moreover, the lack of clarity of the contested norm is said to be confirmed by the amendments of 15 May 2014, which supplemented this norm, including in the range of public officials also officials of state and local government

[31] Separate Thoughts of the Judges of the Constitutional Court Ineta Ziemele and Sanita Osipova in Case No. 2018-10-0103. Available in Latvian: https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2018/06/2018-10-0103_Atseviskas_domas.pdf#search=2018–10–0103 [viewed 10.10.2021.].

[32] Judgment of the Constitutional Court of the Republic of Latvia of 24 July 2020 in Case No. 2019–22–01. Available in Latvian: https://www.satv.tiesa.gov.lv/web/viewer.html?file=https://www.satv.tiesa.gov.lv/wp-content/uploads/2019/10/2019-22-01_Spriedums-1.pdf#search=2019–22–01 [viewed 10.10.2021.].

[33] 15.05.2014. Amendments to Criminal Law. Available in Latvian: https://likumi.lv/ta/id/266590-grozijumi-kriminallikuma [viewed 10.10.2021.].

enterprises, hence, before the introduction of these amendments the status of a public official, in the meaning of the Criminal Law, was not applicable to them.

The Constitutional Court found that legal regulation was constantly evolving, *inter alia*, by the legislator improving the wording of regulatory enactments to reflect its will more accurately. Allegedly, just because the legislator later decides to amend the respective norms *per se* does not mean that they had not been sufficiently clear before. By amendments of 15 May 2014, the legislator amended Section 316 (1) of the Criminal Law to make it even clearer, however, this *per se* does not mean that it had not been sufficiently clear before to make persons criminally liable in accordance with Section 320 (3). Respectively, the applicants could have foreseen that the contested norm could be applied to them.

1.4. In Case No. 2020-23-01

By the judgement of the Constitutional Court of the Republic of Latvia of 19.02.2021 in case No. 2020-23-01 "On compliance of Section 236 (1) of the Criminal Law (in the Wording that was in Force until 31 March 2013) with Article 90 and Article 92 of the *Satversm*e of the Republic of Latvia and of the Transitional Provision of the Law of 29 October 2015 "Amendments to the Criminal Law" with Article 1 and Article 92 of the *Satversme* of the Republic of Latvia"[34], the contested norm was recognised as being compatible with Art. 90 and the second sentence of Art. 92 of the *Satversme* of the Republic of Latvia. As regards the Transitional Provisions of the Amendments to the Criminal Law, contested in this case, the Constitutional Court identified incompatibility with the *Satversme*; however, in this part of the judgement the reasoning was not linked to the requirements regarding the clarity of criminal law provisions, therefore the Constitutional Court's judgement in this part will not be examined in the research.

The contested Criminal Law provision provided for criminal liability for negligent storage, carrying, transportation or forwarding of a firearm or firearm ammunition or for negligent storage, transportation or forwarding of high-powered pneumatic weapons, explosives and explosive devices, in violation of the regulations that regulate the circulation of weapons, if by this offence another person has been given the possibility to acquire this firearm, firearm ammunition, high-powered pneumatic weapons, explosives and explosive devices. The submitter of the constitutional complaint held that the contested Criminal Law provision established criminal liability for a person's activity envisaged in another regulatory enactment and that constituted elements of the criminal offence were substantive. Thus, to recognise a person guilty of committing the criminal offence envisaged in the contested Criminal Law provision, not only a violation of legal norms that

[34] Judgment of the Constitutional Court of the Republic of Latvia of 19 February 2021 in Case No. 2020–23–01. Available in Latvian: https://www.satv.tiesa.gov.lv/web/viewer.html?file=https://www.satv.tiesa.gov.lv/wp-content/uploads/2020/04/2020-23-01_Spriedums.pdf#search=2020–23–01 [viewed 10.10.2021.].

regulate storage of weapons and ammunition but also certain consequences should be established, i.e., the possibility created for another person to acquire this firearm or ammunition. The occurrence of such consequences is considered to be a feature of the respective criminal offence; the contested Criminal Law provision, however, is said to provide for only an abstract possibility that such consequences could set it. The applicant holds that the consequences envisaged in the contested Criminal Law provision, i.e., the possibility for another person to acquire the firearm or ammunition, are very vague.

The Constitutional Court found that the regulatory enactments that regulate the circulation of firearms set the requirement that a qualification test had to be passed before acquiring a firearm for the first time. Passing of this test proves, *inter alia*, that a person is familiar with the procedure of circulation of firearms and ammunition. The applicant is a police officer who had the permit to use a service firearm. Such right is claimed to be inseparably linked to the obligation, while in service, to act with special caution. Hence, it can be validly expected that a person, who has the right to use a firearm, while performing their official duties, will have better knowledge than other persons not only of the regulations that regulate the circulation of firearms and ammunition but also of the criminal law risks related to violation of these regulations. The Constitutional Court found that a person could have ascertained for what kind of action they could be made criminally liable in accordance with the contested Criminal Law provision; hence, the contested Criminal Law provision is to be considered as being sufficiently clear and foreseeable to make a person criminally liable.

2. Interpretation of Art. 90 and Art. 92 of the *Satversme*

In all the cases examined above, the Constitutional Court's legal reasoning and interpretation of Art. 90 and the second sentence of Art. 92 of the *Satversme* have been very similar.

Pursuant to Art. 90 of the Satversme, everyone has the right to know one's rights. This provision of the Satversme falls within the principle of the rule of law, pursuant to which only generally binding legal norms can establish persons' rights and obligations. Art. 90 of the Satversme encompasses the State's obligation to create a mechanism for ensuring that persons are informed about legal regulation and its content.[35] At the moment when an offence is committed, for which later criminal liability sets it, a clear and foreseeable legal norm must be in force, providing that the particular conduct of a person – actions or failure to act – is to be recognised as being criminal.[36] A norm is to be recognised as being unclear if it

[35] Judgement in Case No. 2020-23-01 para. 11, Judgement in Case No. 2018-10-0103, para. 13.1.

[36] Judgement in Case No. 2020-23-01 para. 9, Judgement in Case No. 2019-22-01, para. 14.

is impossible to establish its genuine meaning by using interpretation.[37] No matter how precisely and clearly legal norms are formulated, it will always be necessary to clarify their content through interpretation.[38] The European Court of Human Rights also has noted: no matter how precisely and clearly legal norms are worded, it will always be necessary, also in criminal law, to clarify their content through interpretation. It will always be necessary to clarify doubtful issues and to adapt legal provisions to changing circumstances. Although certainty is very desirable, it may lead to excessive rigidity but law must be able to follow the changing circumstances. Hence, inevitably, laws are formulated by using words with several possible meanings and the interpretation and application of which is the matter of practice.39 Laws and legal norms that restrict a person's fundamental rights must be appropriately understandable and foreseeable. I.e., a norm must be formulated with sufficient precision so that an individual, in case of necessity seeking appropriate advice, would be able to regulate their actions.[40]

Pursuant to the second sentence of Art. 92 of the *Satversme,* the legislator must formulate criminal law provisions so as to ensure safeguards to a person against arbitrary charges, sentencing, and punishing.[41] Criminal liability is the most severe possible form of legal liability, and its consequences can have a significant impact upon a person's life also after the criminal sentence has been served. Therefore, the norms that provide for criminal liability must have a greater certainty contentwise compared to the provisions in other areas of law.[42] However, the duty to adopt norms that are sufficiently clear may not be exaggerated.[43] If a legal norm allows its addressee to understand and foresee the obligation imposed upon them and the parties applying legal norms – to establish all actual and legal circumstances to examine the occurrence and decide on making a person criminally liable then this norm can be considered to be sufficiently clear.[44] The concept of "a legal act", used in the second sentence of Art. 92 of the *Satversme,* falls within the concept of "law" , included in Art. 90 of the *Satversme*.[45] Hence, norms that provide for criminal liability may be recognised as being law in the meaning of the second sentence of Art. 92 of the *Satversme* only if they meet the same quality criteria of legal norms that are included in Art. 90 of the *Satversme*.[46] The degree of clarity

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[37] Judgement in Case No. 2020-23-01 para. 9, Judgement in Case No. 2019-22-01, para. 13., Judgement in Case No. 2018-10-0103, para. 13.1.

[38] Judgement in Case No. 2020-23-01 para. 11, Judgement in Case No. 2018-10-0103 para. 18.1.

[39] Judgement in Case No.2019-22-01 para. 19, ECHR judgement of 25 June 2009 in Case Liivik v. Estonia (application No 12157/05), para. 94.

[40] Judgement in Case No. 2020-23-01 para. 11.

[41] Judgement in Case No. 2020-23-01 para. 11, Judgement in Case No. 2019-22-01 para. 14.

[42] Judgement in Case No. 2019-22-01 para. 14, Judgement in Case No. 2018-10-0103 para. 13.2.

[43] Judgement in Case No. 2019-22-01 para. 14, Judgement in Case No. 2008-09-0106 para. 7.2.

[44] Judgement in Case No. 2020-23-01 para. 11, Judgement in Case No. 2019-22-01 para. 14, Judgement in Case No. 2008-09-0106 para. 8.

[45] Judgement in Case No. 2020-23-01 para. 11, Judgement in Case No. 2019-22-01 para. 14.

[46] Judgement in Case No. 2020-23-01 para. 11, Judgement in Case No. 2018-10-0103 para. 13.2.

that a legal norm should attain when a criminal penalty is applied to a person, in turn, should be examined by taking into account the specific requirements set out in the second sentence of Art. 92 of the *Satversme*.[47]

The second sentence of Art. 92 of the *Satversme* encompasses also the fundamental rights defined in para. 1 of Art. 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.[48] The European Court of Human Rights has recognised that a person should know, judging by the wording of the respective legal norm and, if necessary, after studying the way courts have interpreted this wording, for what kind of actions or failure to act criminal liability could set in and what kind penalty could be applied for such actions or failure to act. Moreover, a legal norm may comply with the foreseeability requirements also if the person needs to receive qualified legal assistance in order to assess to a reasonable degree the potential consequences of certain actions in the particular circumstances. If a legal provision, on the basis of which a person has been convicted, is incompatible with these requirements, the European Court of Human Rights recognises that a violation of para. 1 of Art. 7 of the Convention has occurred.[49]

In several judgements by the Constitutional Court, examined above, the compliance of blanket criminal law norms with the requirements regarding the clarity of these norms was reviewed. In this respect, the Constitutional Court has noted that the inclusion of such legal norms, which define criminal liability for a person's actions, which are envisaged in another regulatory enactment, in the Criminal Law is seen as one of the measures for formulating criminal law precepts and such norms that provide for such criminal liability cannot be recognised as being unclear only because their content must be clarified on the basis of other regulatory enactments.[50] It has been recognised also in the case law of the European Court of Human Rights that constructing blanket criminal law norms *per se* is not contrary to the requirements set down in Art. 7 of the Convention.[51] Taking into account that, in the case of blanket criminal law norms, their content must be clarified in conjunction with regulatory enactments that regulate another, special area, the Constitutional Court also has noted that the required degree of foreseeability of the criminal law provision depends also on the content of the related regulatory enactment, the area that it has to regulate,

47 Judgement in Case No. 2020-23-01 para. 11.

48 Judgement in Case No. 2020-23-01 para. 11, Judgement in Case No. 2018-10-0103 para. 13.2.

49 Judgement in Case No. 2020-23-01 para. 11, ECHR judgement of 25 June 2009 in Case Liivik v. Estonia (application No. 12157/05), para. 93, ECHR judgement of 12 February 2008 in Case Kafkaris v. Cyprus (application No. 21906/04), para. 150, 152.

50 Judgement in Case No. 2020-23-01 para. 15, Judgement in Case No. 2018-10-0103 para. 15, Judgement in Case No. 2008-09-0106 para. 7.2.

51 Guide on Article 7 of the European Convention on Human Rights, 2021, p. 14. Available: https://www.echr.coe.int/Documents/Guide_Art_7_ENG.pdf [viewed 10.10.2021.].

the number and status of its subjects.[52] Those persons, who, in their professional activities, are used to acting with special caution, can validly be expected to very meticulously assess the risks related to such activities and to be able to accordingly foresee the criminal law risks pertaining to their professional activities better than other persons.[53] Similarly, the European Court of Human Rights has likewise noted that the foreseeability of a norm is examined from the perspective of the convicted person[54].

In several of the examined judgements by the Constitutional Court, the clarity of criminal law provisions was reviewed in situations, where later the norm had been amended by the legislator. In such instances, actually, the dispute regarding the clarity of norm can be reduced to the question whether the legislator had only specified these norms, making them clearer, without changing the scope of the norm, or did the legislator introduce additions, broadening or narrowing the scope of the norm accordingly. As regards these issues, the Constitutional Court has only concluded that the legal regulation is in constant development, *inter alia*, by the legislator improving the wording of normative acts so that they would reflect its will more precisely. The fact that the issuer of regulatory enactments later decides to amend the respective norms *per se* does not mean that previously they had not been sufficiently clear.[55] Thus, the fact that the legislator has amended the contested norm of the Criminal Law later, *inter alia*, by specifying the offence for which henceforth criminal liability is envisaged, as such is not the grounds for recognising such a Criminal Law provision as being unclear or unforeseeable.

Generally upholding these findings of the Constitutional Court, the authors of this research, nevertheless, advance the opinion that, at least in one of the Constitutional Court's judgements examined, this conclusion, while generally correct, has been attributed to the issue under review without grounds. Namely, it pertains to the judgement by the Constitutional Court of 21.02.2019 in case No. 2018-10-0103, where it was found that the legislator, by adding to the contested Section 237[1] of the Criminal Law a note that liability was envisaged not only for unlawful circulation of devices intended for taking measures of operational activities but also for the circulation of devices intended for hindering operational activities, had not broadened the scope of this norm but had only worded this criminal law provision with greater clarity and precision, without changing its scope. Thus, in the authors' opinion, an erroneous conclusion was made that prior to introducing these amendments to this Criminal Law provision unlawful

[52] Judgement in Case No. 2020-23-01 para. 18, Judgement in Case No. 2019-22-01 para. 18, Judgement in Case No. 2018-10-0103 para. 13.2.

[53] Judgement in Case No. 2020-23-01 para. 18, Judgement in Case No. 2019-22-01 para. 24, ECHR judgement of 11 November 1996 in Case Cantoni v. France (application No. 178622/91), para. 33.

[54] ECHR judgement of 21 October 2013 in Case Del Río Prada v. Spain (application No. 42750/09), para. 112.

[55] Judgement in Case No. 2020-23-01 para. 17, Judgement in Case No. 2019-22-01 para. 22.2, Judgement in Case No. 2018-10-0103 para. 18.2.

circulation, including storing, of devices that could be used for hindering measures of operational activities had been criminalised.

In attempting to clarify the legislator's will in this matter, it is worth looking at the process of drafting these amendments to the Criminal Law[56] and the available preparatory materials. This proposal was submitted for the second reading by deputy A. Judins.[57] The transcript of the *Saeima's* sitting on 22.10.2015[58] shows that prior to voting on introducing additions to Section 237[1] (2) of the Criminal Law, deputy A. Judins provided the following explanation to the *Saeima* members from the podium: "Proposal to specify Section 237[1], which defines liability for violating the regulations on the circulation of goods of strategic importance. Currently, the second part of the Section provides for liability for violation of the prohibition on the circulation of the equipment, devices or instruments and their components specially designed or adapted for the operational activity measures to be performed by specific methods, but it is not clearly stated that liability sets in also for handling devices intended for hindering. However, it follows from the Cabinet Regulation that liability should set in. Hence, there is a certain discrepancy between the provisions of the Cabinet Regulation, the special law and the Criminal Law. By adopting these amendments, henceforth liability would be envisaged not only for handling the devices that have been created for performing the said activities but also for handling devices intended for hindering them." The transcript shows that by 50 votes "in favour", 9 votes "against" and 13 votes "abstaining" this proposal by A. Judins was supported. Consequently, at the *Saeima´s* sitting on 12.11.2015[59] , without any debates and further explanations, this draft law was adopted by 89 votes in the third, final, reading, In the legislator's opinion, handling devices intended for hindering measures of operational activities was not criminally punishable, and the amendments to the Criminal Law, referred to above, were adopted exactly for criminalising such activities. In such circumstances, particularly taking into account the justification of politicians for introducing amendments in the respective Criminal Law provision, it is rather contestable that the addressees of the criminal law provision, by way of interpretation or by receiving appropriate legal advice, had the possibility to foresee with certainty and to understand that the acquisition and storage of devices intended for hindering measures of operational activities was a criminally punishable action before these amendments to the law were adopted.

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[56] 12.11.2015. Amendments to Criminal Law.

[57] Andrejs Judins, Member of the 12th Parliament of the Republic of Latvia, 01.10.2014. Proposals for the draft law "Amendments to the Criminal Law" (344/Lp12). Available in Latvian: https://titania.saeima.lv/LIVS12/SaeimaLIVS12.nsf/0/c9483bcc4191ec0fc2257ed10045bcbf/$FILE/Kriminallikums_uz%20otro%20lasījumu_A.Judins%20(1).docx [viewed 10.10.2021.].

[58] Transcript of the sitting of the 12th convocation of the *Saeima* of the Republic of Latvia on 22.10.2015. Available in Latvian: http://titania.saeima.lv/LIVS12/saeimalivs12.nsf/0/B5F885A21BD010AEC2257EEB004F3883?OpenDocument [viewed 10.10.2021.].

[59] Transcript of the sitting of the 12th convocation of the *Saeima* of the Republic of Latvia on 12.11.2015. Available in Latvian: http://titania.saeima.lv/LIVS12/SaeimaLIVS2_DK.nsf/DK?ReadForm&nr=5ef628af-9571-43af-b3b2-1a9d3697a7f3 [viewed 10.10.2021.].

Two Justices of the Constitutional Court also have pointed out in their dissenting opinion on this judgement[60] that, in their opinion, by the law of 12 November 2015 "Amendments to the Criminal Law" the norm was not made clearer but a new regulation was included in this norm, pursuant to which criminal liability sets in for the violation of the prohibition on the circulation of devices or equipment intended for hindering measures of operational activities.

At this point, the authors of the study would also like to take a critical look at the Constitutional Court's findings in several of the judgements examined above, i.e., that specifying (without changing the scope of provision) of criminal law norms *per se* is not the grounds for recognising such a norm as being unclear or unforeseeable in its wording before it was specified. If a criminal law provision had been sufficiently qualitative with understandable and clearly defined limits of its application, then the legislator should not be engaged in specifying such qualitative norms, all the more so if, as the result of amening the norm, its scope is not changed. Such actions by the legislator, in specifying some criminal law provisions, in the authors' opinion, is a sign *per se* that there had been some complications in the practice of applying this norm and that there had been objective grounds for making the limits of applying the law more comprehensible. This, in turn, leads to the conclusion that prior to introducing such amendments, the norm, also in the legislator's opinion, had not been of sufficient quality and its applicability had not been foreseeable. Hence, in such cases, the parties applying the criminal law provisions, who are considering how to qualify a person's actions by the constitutive elements of this norm, should act with exceptional caution, in each particular case, looking at the foreseeability of the scope of such a norm, which has later undergone "cosmetic" specifications, from the offender's perspective.

In conclusion, the authors of the research can only call upon the legislator and the parties applying legal provisions to keep in mind that the members of society are far from being sterling lawyers who are able to interpret criminal law provisions and understand the scope of a norm in conjunction with other regulatory enactments. Moreover, there are not always grounds to assume that, in disputable cases, addressees of criminal law provisions might even suspect that one or another criminal law provision might apply to them and that it would be advisable to seek the advice of qualified lawyers regarding the content of this norm to make an intentional choice of actions that are either compatible or incompatible with the Criminal Law. It is not contested that the persons without legal education in the absolute majority of cases are also able "to tell the right from wrong" and understand, which actions could be criminally punishable, and which – not, on the basis of common sense and the system of values prevailing in society. However, development of society and criminal law has resulted in increasingly

[60] Separate Thoughts of the Judges of the Constitutional Court Ineta Ziemele and Sanita Osipova in the Case No. 2018-10-0103, para. 3.3. Available in Latvian: https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2018/06/2018-10-0103_Atseviskas_domas.pdf#search=2018–10–0103 [viewed 10.10.2021.].

greater complexity of the construction of the constituent elements of criminal law provisions, sometimes criminalising actions, which, in accordance with ethical standards comprehensible to the majority, might seem not to be punishable. Therefore, in such cases, it is of particular importance that those who are drafting legal norms should "step into the shoes of an average person" to try to understand, whether the message sent by the Criminal Law regarding the prohibition of certain actions will reach its addressees in due time and, consequently, will be able to deter them from an intentional violation of such a prohibition.

Conclusion

1. The Constitutional Court of the Republic of Latvia has examined the quality and clarity of criminal law provisions in four disposed cases. It can be found that the criteria used to review the compatibility of these norms with the *Satversme* are stable and uniform in the Constitutional Court's judicature, and are also compatible with the findings of the European Court of Human Rights.
2. Requirements regarding foreseeability and clarity of criminal law provisions follow from Art. 90 and the second sentence of Art. 92 of the *Satversme*.
3. At the moment when an offence, for which later criminal liability sets in, is committed, a clear and foreseeable legal norm must be in force, providing that the particular conduct of a person – action or failure to act – is to be recognised as being criminal.
4. Criminal liability is the most severe possible form of legal liability, and its consequences can have a significant impact upon a person's life also after the criminal sentence has been served. Therefore, the norms that provide for criminal liability must have greater certainty contentwise compared to the provisions in other areas of law. At the same time, it does not mean that criminal law provisions should be strictly casuistic or that wordings cannot be used therein that require interpretation to clarify their content. A norm is to be recognised as being unclear, if its true meaning cannot be clarified through interpretation. Likewise, a criminal law provision will comply with the quality and clarity requirements, if its scope can be established by receiving qualified legal assistance. In all cases, the clarity of norms must be assessed from the perspective of the norm's addressee.
5. In those cases, where the legislator has amended the criminal law provision, special care must be taken in assessing, whether, as the result of amendments, the legislator specifies these norms without changing their scope or also adds to them, broadening or narrowing their scope accordingly. However, in cases where the content of the norm has been specified without changing its scope, special care is needed in assessing, whether such specification of a criminal law provision is not a sign of some deficiencies relating to the quality of the previous wording of the norm, and whether such a norm in its previous wording also could be considered as being clear and having foreseeable limits of application.

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