The Concept of Criminal Penalty Policy and the Resulting Criminal Law Amendments

Valentija Liholaja, Dr. iur.
Faculty of Law, University of Latvia
Professor at the Department of Criminal Law
E-mail: *Valentija.Liholaja@lu.lv*; phone: 67034552

The article deals with the issue of the current changes in the Criminal law of our country, which in accordance to the criminal penalty policy concept are to be introduced both in the General and the Special part provisions, essentially affecting the assumptions following from the criminal law doctrine and practice about separate criminal law institutions, as well as determination of punishment for committing a criminal offence. The author of the article will express her evaluation about compliance of some of the planned amendments to the conclusions made in theory and to the practical needs.

Keywords: Criminal law, criminal offence, penalty, criminal penalty policy.

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Introduction

On January 9, 2009 the Cabinet of Ministers of the Republic of Latvia approved the concept of the criminal penalty policy worked out by the Ministry of Justice,[1] which includes conceptual proposals for changes in the system of criminal penalty that "should be used elaborating the necessary amendments in the Criminal law[2] (henceforward also – CL) and in other legal acts whose adoption would facilitate more efficient application of juridical means for achieving the goals of the criminal penalty".[3]

Based on the criminal penalty policy statements the Ministry of Justice has worked out a bulky draft law "Amendments in the Criminal law" which was adopted on December 13, 2012.[4] Those are already the 43th amendments in the Criminal law during its 12 years of its existence.

Elaboration of criminal penalty policy conception and the amendments in the Criminal law following from it is a significant event not only in re-evaluating and reforming of penal policy which in general is to be evaluated as necessary but it also includes essential changes in understanding of several criminal law institutes (for example, classification of criminal offences, multiplicity and its types, penalty and its goal) which requires radical revision of conclusions and assumptions of the criminal law doctrine. Once again carefully analysing the conception of Criminal penalty policy and the draft law elaborated on its basis[6], in which after its reviewing at the meeting of the Cabinet of Ministers committee a number of changes were made, and the report on the initial impact of the draft law (abstract)[7], the present article was written in which its author expresses her evaluation of some of the amendments proposed in the draft law.

1 On classification criteria of criminal offences

In Section 7 of the existing Criminal law criminal offences are divided into criminal violations and crimes while the crimes are subdivided into less serious crimes, serious crimes and especially serious crimes.

As it follows from the provision of the law dividing criminal offences into criminal violations and crimes, the legislator has been guided by the prescribed type of penalty and the maximum length of deprivation of freedom of liberty penalty as stipulated by the specific paragraph of the section in the Special part of the Criminal law providing that there is a criminal violation for which the deprivation of freedom is for no more than two years or a lighter punishment is prescribed. Criminal violation includes both intentional crimes as well as the crimes committed out of negligence yet the legislator does not emphasize it especially.

While subdividing crimes into less serious crimes, serious crimes and especially serious crimes one of the classification criterion is also the type of guilt. Paragraph 3 of Section 7 of the CL defines a less serious crime as an intentional offence for which the law provides for deprivation of liberty for a term exceeding two years but not exceeding five years, or an offence, which has been committed through negligence and for which the law provides for deprivation of liberty for a term exceeding two years, but not exceeding ten years; while a serious crime is an intentional offence for which the law provides for deprivation of liberty for a term exceeding five years but not exceeding ten years, or an offence, which has been committed through negligence and for which the law provides for deprivation of liberty for a term exceeding ten years (paragraph four of Section 7 of the CL). According to paragraph five of Section 7 of the CL an especially serious crime is an intentional offence for which this Law provides for deprivation of liberty for a term exceeding ten years, life imprisonment or the death penalty.

Although in some publications other possible criteria for classification of criminal offences are discussed,[8] learning from the experience of other countries in solving this issue one may conclude that the type of penalty, maximum limit of deprivation of freedom and the type of guilt are those criteria that are used to classify criminal offences.

The draft law intends to revise understanding of the criminal violation stipulating that it is a violation for which no deprivation of liberty is provided for, and it is also planned to revise the elements of crime correspondingly reducing the length of deprivation of liberty. I assume that there should be discussions about the

intention of the authors which is included in paragraph four of Section 7 of the CL to define that *"a serious crime is an intentional offence for which the law provides for deprivation of liberty for a term exceeding three years but not exceeding eight years (..)"*. Further on it is indicated: *"If for an intentional serious crime the law provides for deprivation of liberty not exceeding five years then a* ***lighter penalty may be provided for it****"* (here and henceforward the bold type by the author). Considering the fact that the number of such serious crimes in the Criminal law for committing of which it provides for deprivation of liberty from four to five years will significantly increase and will amount to 124 sanctions[9], which will provide for deprivation of liberty and at the same time will contain stipulations about a short-term deprivation of liberty, community service and a fine, such a formal approach to defining sanctions could hardly be admitted as correct.

Since the draft law intention is to have a separate discussion about defining of sanctions I will merely indicate that a well-motivated solution in regard to the penalty that does not provide for deprivation of liberty and community service for serious crimes has been offered by A. Reigase, indicating that possibly community service should not apply to a serious crime that is linked with violence or a threat of violence, has caused severe consequences, created essential damage and has been committed on a large scale.[10] Yet looking into the draft law one must conclude that all the alternative punishments for deprivation of liberty are provided for, for example, for kidnapping of a person using violence or threats of violance, besides the deprivation of liberty for the above crimes is planned to be reduced from ten to five years (paragraph one of Section 153 of the CL), similar provisions are defined for robbery which by substance is associated with violence or a threat of violence (paragraph one of Section 176 of the CL), with an attack to a representative of an authority or some other public official; the same punishment is applicable to a number of serious crimes whose consequences have been death of a person or some other severe consequences, for example, improper performance of professional duties by a medical practitioner (paragraph two, Section 138 of the CL), violations of labour protection provisions (paragraph two, Section 239 of the CL), using official position in bad faith (paragraph two, Section 318 of the CL) and so on.

An essential damage that in many provisions excluding indication to repetition of a criminal offence during a year, has been provided as a condition for criminal liability or forms its qualified substance, has been evaluated in the draft law in a fairly peculiar way, including it into the substance of criminal violations as well as in the substance of less serious and serious crimes, although this criterion has a uniform legal definition with quite serious criteria. In accordance to Section 23 of the law "On Procedure of Enactment and Application of the Criminal Law"[11] liability for a criminal violation as stipulated in the Criminal law as a result of which a serious damage has been caused sets in if resulting from the criminal violation not only a serious material damage has been caused (it exceeds sum total of five minimum wages as defined in the Republic of Latvia), but if other interests and rights that are protected by law are endangered or such endangerment is considerable. While as it has been explained by Criminal cases department of the Senate of the Supreme Court of the Republic of Latvia, *"Infringement of the rights guaranteed in the Constitution is by all means to be recognized as a considerable infringement of a person's rights and interests in the understanding of Section 23 of the law "On Procedure of Enactment and Application of the Criminal Law"*[12].

Likewise it is necessary to note that it is planned to amend paragraph one of Section 7 of the CL by specifying that criminal offences are dividend into criminal violations and crimes **according to the character and damage of infringement of a person's or society's interests**, explaining in the synopsis of the draft law that at present the Criminal law *"does not correctly indicate the criterion of this classification"*, i.e., *"defining the types of criminal offences the legislator has linked seriousness of the criminal offence with the maximum penalty for the specific criminal offence, namely, the more severe the punishment is provided for in the sanction of the CL, the criminal offence is defined as more serious in the disposition of the Section,"* which follows from a literal interpretation of Section 7 of the Criminal law.

Yet objecting to such an interpretation, it should be indicated that a sanction already is that part of the criminal law provision by which the legislator, taking into account the degree of damage of the criminal offence defines the type and scope of penalty.[13] I can only reiterate what I have previously said that it would be logical to presume that the legislator to whom the state has delegated the task of designing penal policy, by providing for in the sanction of criminal law one or another penalty, has defined it adequately depending on the degree of damage caused by the criminal offence in order to prevent the threat to legally protected interests.[14]

If so, there is no reason to indicate at some incorrectness of classification criteria definition, especially if it has been recognized in the abstract of the draft law that *"The penalty provided for in the sanctions of the CL directly depends on the damage that is caused or may be caused by the specific criminal offence to the interests protected by law"*. In principle not objecting to the new edition of paragraph one of Section 7 of the CL which is to be regarded as merely more accurate definition of the provision, at the same time it should be indicated that, firstly, it already follows from the previously expressed theoretical conclusions about the essence of a sanction, secondly, apart from a literal interpretation there are a number of other interpretation methods to clarify the understanding of the essence of the text, which, as it indicated by E. Meļķisis, "include both the understanding about the will of the legislator, as well as about the aim of the law (provision), its motivation, intent, meaning – everything that in legal scholarship is called *ratio legis*."[15]

I believe one cannot evaluate positively the trend that has been observed over the past few years to include in the provisions of the Criminal law such specifications, even theoretical interpretations that follow from the very contents of the text and whose place is in comments and academic publications. It should also be noted that such a special indication to the character and degree of damage of the criminal offence as a classification criterion can be found only in separate criminal codes of the former USSR republics where like in Article 15 of the Russian Federation Criminal code it is mentioned[16] that the offences listed in the Criminal code are classified depending on their character and degree of threat they cause to society. While the legislator in our neighbouring countries Estonia[17] and Lithuania[18] – like in Austria[19], Switzerland[20], German Federal Republic[21] and other countries indicates only the ways of grouping criminal offences and the maximum penalty for each of the offences.

2 On multiplicity and its forms

The draft law plans to revise the multiplicity forms, excluding from the criminal law of Latvia one of them – repetition of criminal offences that at present is included in more than 40 Sections of the Criminal law as a qualifying element.

Pursuant to the first and the second paragraph of Section 25 of the Criminal law, repetition of criminal offences is the commission by one person of two or more criminal offences, which are provided for in one and the same Section of this Law, or two or more criminal offences which are provided for in various Sections of this Law; if liability for such repetition is provided for in this Law (for example, in Section 181 of the CL in regard to repeated theft, fraud, misappropriation). Repetition of a criminal offence is not constituted by an offence for the commission of which a person is released from criminal liability or for which a limitation period has become applicable, or for which the criminal record has been set aside or extinguished pursuant to procedures set out in the Law.

Since pursuant to the existing legislation repetition sets in irrespective of the fact whether the person has not been brought to criminal liability for the previously committed criminal offence (offences) and all the criminal offences are adjudicated during one criminal procedure or if a court sentence has already been enforced for the previous committed criminal offence as long as legal consequences have been retained, the situations establishing this repetition are to be examined separately, in particular because the proposal to delete from the Criminal law repetition as a form of multiplicity which also means refusing from it as a circumstance that forms qualified substance. Since at present according to the existing provisions, repetition is formed irrespective of the fact whether the person has been called to trial for the committed criminal offence(s) and all the criminal offences are adjudicated within one court proceeding also for the previously committed offences, and this is motivated by different factors some of which must be examined in greater detail.

Both in the synopsis of the draft law and in the above mentioned publication by I. Gratkovska and U. Zemzars[22] as one of the arguments is mentioned the fact that by excluding repetition, just and adequate punishment will be ensured for each committed offence since the existing practice is supposed to have created a situation when quite often for repeatedly committed criminal offences that have the same substance the accused is imposed too light a penalty since the committed acts are evaluated not as several offence but as one criminal offence.

The fact that the practice of determination of punishment quite often does not comply to the general principles of determining punishment as provided for in Section 46 of the Criminal law is confirmed by summary of different categories of cases provided by the Supreme Court of the Republic of Latvia for various years[23] (the author of the given publication has participated in summarizing court cases for several years), but that is not a flaw of the Criminal law. The legislator, taking into consideration repetition as a qualifying circumstance has stipulated in the respective section a more severe penalty for several criminal offences compared to the penalty provided for the same or the same type of criminal offence. For example, paragraph one of Section 175 of the Criminal law for the theft without aggravating circumstances provides for deprivation of liberty till four years, for a repeated theft – up to six years and complying with the provisions of the law it is possible to ensure individualization of punishment and to determine a penalty that would be adequate to the offence.

The position that adequate and fair punishment can be determined by using the existing legal provisions has been expressed also by U. Krastiņš, indicating that *"The sanctions in the Special part of the Criminal law are sufficiently flexible to react with an adequate penalty to a larger number of the same offences (for instance, several thefts) that form a repetition."*[24] Yet instead of explaining the cause of such

practice – inability or unwillingness to comply to the provisions of the law – and improving the punishment determination practice and complying with the prescriptions of the law in this area, another solution has been favoured during the last few years – to amend the Criminal law resulting in repeatedly expressed concerns about stability, or to be more precise instability, of the law.[25]

Referring to the provisions of paragraph one of Section 50 of the CL that if a person has committed several independent criminal offences punishment must be adjudged for each separate offence, it has been indicated that adjudicating one aggregate punishment for several criminal offences in case of their repetition in neither correct, or fair and that it actually undermines the whole system. In fact it should be noted here that the procedure of determining punishment for criminal offences as laid down in Section 50 of the CL in those instances when a person has committed several independent offences for which liability is provided for in different sections of the Criminal law, for example, for theft and hooliganism when punishment is to be determined for each of these offences separately and then the final punishment is to be determined according to aggregation of the criminal offences which is determined including the lesser punishment within the more serious one or also totally or partially adding up the punishments. By adopting the amendments such a procedure will be applied also to several identical criminal offences of the same type which at present form repetition.

Before modulating the situation that will be put in place for determination of punishment in such cases, it is necessary to examine what amendments are planned to be introduced in Section 50 of the CL to determine the final punishment. If at present paragraph one of Section 50 of the CL provides that the aggregate punishment shall not exceed the maximum punishment determined for the respective offence, then the draft law contains a different principle taking into consideration the classification of criminal offences and the person directing the proceedings who decides about the punishment – a prosecutor drawing up the injunction on punishment or the court adjudicating the sentence. Namely, the draft law envisages that in cases when the final aggregate punishment is determined by the court, its scope or term shall not exceed the maximum scope or term provided for **the most serious of the committed criminal offences** but it shall be no more than half of the maximum scope or term stipulated for the most serious of the criminal offences. While the prosecutor drawing up the injunction on punishment for a criminal offence or a less serious crime shall not determine the punishment exceeding the maximum scope or term of punishment that is provided for the most serious of the committed criminal offences.

It follows from the above said that the edition offered by the draft law refers only to those cases when separate and different criminal offences of various degree of seriousness and the inflicted harm or the same type of offence has been committed that qualifies by the same provision or different paragraphs taking into consideration qualifying circumstances on the grounds of which liability is also differentiated, for example, a theft without qualifying circumstances has been committed, it is followed by a theft in a group of persons pursuant to a prior agreement, then a theft by entering an apartment is committed, and finally a firearm has been stolen. Liability for such offences is stipulated in the first, second, third and fourth paragraphs of Section 175 of the CL. In order to determine the final punishment, partly or completely summing up the punishment stipulated for each of these separate crimes, the court, if it will deem necessary to exceed the maximum

term of deprivation of liberty provided for a firearms theft (in the draft law it is deprivation of liberty till ten years), will be bound by the half of punishment as laid down in paragraph four of Section 175 of the CL, i.e., the ultimate punishment can reach fifteen years.

But if a person commits several thefts that correspond to qualifying elements as stipulated in, for example, the first paragraph of Section 175 of the CL (neither a less serious nor more serious criminal offence has been committed, but all the offences have identical degree of seriousness) for which the present edition of the law provides for deprivation of freedom up to four years and all the alternative forms of punishment for deprivation of liberty, but the draft law has the same punishments that are not associated with deprivation of liberty and also deprivation of liberty up to two years, then the solution will be different.

Since the committed thefts are to be classified as a less serious crime, the court after determining punishments for each of them within the framework of the sanction as provided for in paragraph one of Section 175 of the CL, may include the lighter punishment into the more severe punishment or apply the summing up principle yet it is bound by maximum scope of penalty as provided for in the sanction for a theft without qualified circumstances, namely, 280 hours of community service, a fine of a hundred minimum wages, deprivation of freedom for two years. As we can see, in this case the number of committed criminal offences will change nothing – either there would be five, 10, 20 or even more[26], since they are all less serious crimes for which liability is provided for in the same part of the section and there would be no legal grounds to go beyond the sanctions of the paragraph of the given section. In view of the fact that all these thefts will have the same degree of seriousness, the possibility of determining a more severe punishment as provided for by paragraph two of Section 50 will not be applicable.

We can take another example referring to specific criminal procedure practice. With the first instance court K. P. is found guilty of committing 35 robberies; repetition and entry into an apartment are incriminated as qualifying circumstances for which his punishment has been determined – deprivation of liberty till fifteen years that is a maximum punishment provided for at present in paragraph three of Section 176 of the CL.

If a similar situation would occur after adoption of the amendments in the Criminal law the court would qualify for 35 times the committed robbery in accordance to paragraph two of Section 176 of the CL (robbery has been committed by entering an apartment), determining punishment for every time, which according to the draft law provisions can amount to deprivation of liberty up to eight years and then will determine the final penalty, which by summing up 35 punishments will not exceed eight years anyway because, as mentioned before, according to paragraph three of Section 50 of the new edition of the CL a possibility of exceeding the maximum punishment determining the final penalty may exceed the maximum punishment only if one of the committed crimes is more serious and the sanction for it is more severe but in the given case all the robberies have identical degree of seriousness.

Thus it must be concluded that the result essentially does not change – whether the punishment has been determined for repeatedly committed robberies entering an apartment when one punishment is determined or whether 35 punishments are determined and then the final one. The winner is obviously the person who committed criminal offences for whom the total term of punishment will not be associated any more with the maximum penalty prescribed for the respective type of

penalty but I will refrain from making comments on adequacy and fairness of the punishment.

At the same time it must be indicated that it will cause loss of time and a dilemma for the person directing the proceedings to decide what punishment should be determined in each case of the 35 robberies if they are all identical both by their motivation and by the form of their commitment. K. P., pretending to be a tester of a gas metre entered apartments of elderly women by fraud and then in most cases putting round their necks a towel chocked them till they lost consciousness , after that he stole money and property from the victims and left the apartment locking the door. It must be noted that 25 of the 35 victims were found dead. The death was caused mainly by coronary vessel failure or ischemic disease of the heart, according to the conclusion of forensic experts the cause of death could have been psycho-emotional tension, stress, shock, difficulties of breathing and so on.[27]

This same K. P. has been convicted also for 13 murders that involve robbery and were committed in the previously described manner, qualifying them in accordance with paragraph 3 of Section 118 of the CL and sentencing him to life imprisonment. Excluding repetition from the Criminal law these murders will be qualified for 13 times in accordance to paragraph 6 of Section 117 of the CL as a murder associated with robbery, determining also punishment for every case, which, as it follows from paragraph 6 of Section 117 of the CL is a life imprisonment or deprivation of liberty from ten till twenty years.

Determining punishment in accordance to the second and third paragraphs of Section 46 of the draft law, the character of the criminal offence and the inflicted damage must be taken into consideration, the personality of the guilty person, as well as mitigating and aggravating circumstances of the offence must be taken into account. This requirement is well-grounded and is nothing new, except for the emphasis on the fact that evaluation of mitigating and aggravating circumstances will influence the punishment which will be determined by choosing in a motivated way a greater or less severe scope of punishment, taking into consideration the average scope of the applicable penalty.

Although such an approach is to be evaluated positively, it still must be indicated that it will not be suitable for the analysed example because in all the 13 cases of murder the criteria that are to be considered in determining punishment are identical – all the murders committed within four months are especially serious crimes, the consequences caused by them are irrevocable – many persons have been deprived of life. Assessing the personality of the defendant it has been noted that the previous criminal record has been deleted, he was not registered in drug addiction list, mixed disturbances of personality have been identified, which did not essentially influence his behaviour, in the Matīsa prison he was characterized positively. The court did not identify any aggravating circumstances of his liability, as mitigating circumstances were mentioned his partial confession of his guilt, which in fact is erroneous, as well as the fact that the defendant was supposed to have actively facilitated the disclosure and investigation of the offence.

Evaluating it all, the court will have to determine a punishment guided by the average term of deprivation of liberty, which is fifteen years (20 + 10:2), and motivating it in each case. Theoretically it follows that punishment for the first and the last murder cannot differ because the criteria that have to be evaluated are essentially the same and the repetition is not to be taken into account.

Quite strange, to say the least, seems the provision in paragraph three of Section 50 of the CL that in case of committing a particularly serious crime resulting in a loss of the victim's life **the total time of deprivation of liberty may be determined also for the whole life (life imprisonment)**. Perhaps I am mistaken trying to understand the meaning implied in this sentence, but it can be inferred that life imprisonment can be adjudicated also in the case if for the previously analyzed murders deprivation of liberty punishment will be determined for 13 times. Or will it be determined only for one murder? Here comes another question – for which of the murders one can be sentenced to life imprisonment in order to determine it also as the final punishment? This latter option seems to be the most logical one because how is it possible by summing up 13 freedom deprivation punishments to arrive at life imprisonment?

It is even less comprehensible how life imprisonment could be given for several murders as stipulated in Section 116 of the CL which in itself is a particularly serious crime resulting in deprivation of life of several persons, if in the sanction of this provision life sentence is not provided. In such a way the provisions of the third paragraph of Section 38 of the CL would be violated – that deprivation of freedom for life (life sentence) can be given only in the cases provided for in the Special part of the Criminal law whose amendment or repealing is not envisaged in the draft law.

Apparently analysis even of separate situations leads to the conclusion how ambiguous the proposal to refuse from repetition as a qualifying circumstance is. Large segment of the draft law synopsis is devoted to the analysis of legal provisions in other countries, among those mentioning Russian Federation from whose criminal code repetition (multiplicity) was excluded already in 2003 but unfortunately neither in the synopsis nor in the publications devoted to the planned amendments there is a single mention that the Russian legal experts increasingly often express an opinion that such a solution was erroneous. For example, S. Tasakov (*С. В. Тасаков*), evaluating exclusion of repetition in regard to murder, indicates that such a decision is deeply immoral because thus all the declarations about the value of human life are derogated.[28]

It must be noted that in the course of elaborating the criminal penalty concept another option was also proposed, which in its own day was supported also by U. Krastiņš[29], namely, to exclude repetition in the cases if a person has been already brought to criminal justice and convicted for the previously committed criminal offence, recognizing repeated criminal offence as an aggravating circumstance. Obviously this is the proposal that should have been supported which has been repeatedly claimed by the author of the present article[30], this would have eradicateed any grounds for the discussions about violation of the principle *ne bis in idem*, while looking at it from a practical vantage point, the person directing the proceedings would not have to do the effort-consuming and unnecessary work to associate determination of punishment in criminal proceedings with the same kind of criminal offences.

3 On setting of sanctions in the draft law

Describing the draft law "Amendments in the Criminal law" it is emphasized in the part on punishments that:

1) the possibilities of applying alternative punishments to deprivation of liberty – fines and community service – are expanded as much as possible;

2) the minimum and maximum terms of deprivation of liberty for crimes are essentially decreased;
3) for criminal offences and less serious crimes the amount of fines is considerably increased.

It has been calculated that *"the average deprivation of liberty punishment is reduced by two years or 30%. While for material crimes that account for the largest proportion of the convicted persons which is 49%, deprivation of liberty punishment is reduced on the average even by 40%."*[31] It should also be added that the last edition of the draft law aims at refusing from the arrest whose application for the last time was put off till January 1, 2015 envisaging instead of which deprivation of liberty from fifteen days till three months.

While evaluating the social impact the synopsis of the draft law indicates that:

1) the draft law will achieve conceptual changes in the penal system that will influence more efficient use of legal resources for achieving the aims of criminal penal policy;
2) designing the criminal penalty system, defining criminal punishments and other coercive measures and the conditions of their enforcement a legal mechanism will be implemented that can be used to reduce the number of criminal offences, restore justice after committing a criminal offence and to refrain society from their commitment;
3) the amendments planned in the draft law will provide for prosecutors and judges a possibility of choosing such a criminal legal resource and its scope that has maximum efficiency in each specific case, alongside with that ensuring implementation of a homogeneous penal policy in the country preventing ungrounded increase or mitigation of criminal punishments. Another mentioned impact is unburdening of enforcement of liberty deprivation punishments.

Everything that is said is well-worded and sounds optimistic, unfortunately nothing is mentioned about the actual situation in the area of crime and about how security of society will be ensured in future at least in regard of the threat of crimes against property whose number in 2010 reached 34,908.[32] The draft lacks the link between the increase of fines with solvency of the persons committing criminal offences, it has neither been analysed whether and how the rapidly growing need to employ persons who have been sentenced to community service can influence the aspirations to reduce the number of unemployed and the rate of unemployment in the country.

Trying to understand the principles of setting sanctions in the Special part of the Criminal law and the guideline that determined the changes proposed in the draft law in them, one must fully agree to D. Hamkova's view that sanctions are established *"outside any system and sometimes it is impossible to identify the criterion (..), the endangered interests are not taken into account and hence also the damage caused by the criminal offence"*.[33] As a result a short-term deprivation of liberty and punishments that are not associated with deprivation of liberty – community service and fine – are envisaged in the draft law in all the instances when the criminal offence is classified as a less serious offence, providing for an intentional crime deprivation of liberty for no more than three years and for a serious crime if deprivation of liberty for an intentional crime does not exceed five years, deprivation of liberty punishment in many instances has been reduced till this limit. For example, in the second paragraph of Section 82 of the CL the deprivation of freedom punishment for organisational activities directed towards

destruction of the independence of the Republic of Latvia as a state, with a purpose of incorporating Latvia into a unified state structure with some other state, or destruction thereof in some other way has been decreased from six till five years, including into the sanction of the Section apart from the fine also short-term deprivation of liberty and community service.

In future short-term deprivation of liberty and community service will be applicable also for murdering of a new-born infant, for a murder that has been committed under the state of strong psychic agitation and for a murder committed by a public official violating the provisions of apprehension of a person, which all are serious crimes and for which deprivation of liberty punishment as stipulated in the draft law is going to be up to five years.

These crimes against human life were chosen deliberately since they result in deprivation of another person's life and homicide is one of the crimes that have irrevocable consequences. I could be justly objected that the mentioned murders have been committed under mitigating circumstances but the legislator, when defining this privileged *corpus delicti*, has already taken it into consideration and has prescribed punishments that are much smaller than for a murder without mitigating circumstances. In accordance to international legal acts human life is the highest value in democratic societies, as indicated by E. Levits, "*it is the fundamental and natural right of a person*"[34], that has been listed at the top of human rights catalogue. Providing for the threat against this fundamental and natural rights community service the legislator and the state at large will demonstrate their attitude to the value of life, at the same time standing out among other countries. For a comparison one can mention criminal laws of the above referred countries in which only liberty deprivation punishment is provided for a murder under mitigating circumstances. For example, for murdering of a new-born infant the Penal code of Estonia and the Criminal Code of the Republic of Lithuania (similarly to the existing Criminal law of the Republic of Latvia) only deprivation of liberty up to five years is provided for, in the Austrian Criminal code – from one year to five years.

Alternative penalties in sanctions of all the sections in which the crimes are classified as less serious or as serious with the maximum term of deprivation of liberty have been stipulated without any deeper evaluation. This is obvious, for instance, in Section 310 of the CL which provides for liability for escape from a place of short-term detention or prison. In the first part of the present edition a punishment of deprivation of liberty up to three years is provided for. If escape is associated with violence, or threats of violence against the prison guards or other official of a place of short-term detention or prison, or if commission thereof is repeated or by a group of persons, the applicable punishment is deprivation of liberty for a term not exceeding five years. According to the intention of the authors of the draft law the sanctions as laid down on both paragraphs of the given section provide for a short-term deprivation of liberty, community service and fine even if the person escapes from prison where the person serves a liberty deprivation sentence for a previously committed criminal offence. What kind of community service can we talk about in this case?

Especially disputable is the application of community service for persons in military service who are the special subjects in Chapter XXV of the CL "Criminal Offences Committed in Military Service" providing for this type of punishment in sanctions of 19 sections from the 24 sections of the Chapter. What should be objected here?

Firstly, the special status of a soldier must be noted. According to Section 12 of the Military Service law[35] a soldier exercises the right to employment by performing military service and when doing military service the length of a service day of a soldier shall depend on the necessities of service. Because of soldiers' permanent location in the place of the service they cannot be subject to this type of punishment.[36] Incompatibility of military service with community service is confirmed by the experience of other countries. According to Article 122–22 of the Criminal code of France[37] community service time is suspended during performance of military service. In article 69 of the Penal Code of Estonia "Community service" an option is prescribed to replace imprisonment up to two years with community service, but paragraph three of the article stipulates that on the grounds of an application submitted by a probation service official the court may suspend serving of the imprisonment term for the time when the person is called up to military service or military exercise. Article 46 of the Criminal code of the Republic of Latvia "Community Service" does not stipulate the scope of persons to whom this type of punishment is not applicable. But in none of the sanctions laid down in the Chapter "Crimes and Criminal Offences Against Regional Defence Service" community service as a punishment is mentioned at all.

Secondly, in a number of cases criminal liability for a soldier has been provided for in the basic substance or in the qualified substance if the criminal offence has been committed within the time and under circumstances stipulated in the law. For example, liability for being absent without leave (Section 332 of the CL) and desertion (Section 333 of the CL) is provided for if these crimes have been committed during a war or state of emergency, in battle conditions, or during proclaimed emergency situations in the case of public disorders, terrorism or armed conflict during a declared state of emergency for which at present the applicable punishment is deprivation of liberty from three to eight years and from ten to fifteen years correspondingly. In the draft law, by planning to reduce deprivation of liberty punishment in Section 332 to five years and in Section 333 till four years, supplementing sanctions of this Section by short-term deprivation of liberty, community service and fine. Committing of a criminal offence during war or in battle conditions as a qualifying element is stipulated in the second paragraph of Section 334 of the CL (evading active service), in the third paragraph of Section 335 of the CL (insubordination), while in Section 354 (Unauthorised Leaving of a Battlefield and Refusal to Use a Weapon) is stipulated if it has been committed in the battlefield. By essentially reducing the deprivation of liberty punishment as it is now (in the second paragraph of Section 334 – from ten to fifteen years to four years, in the third paragraph of Section 335 and in Section 354 – from ten to fifteen years down to five years), the sanctions of these sections will also include both short-term deprivation of liberty, as well as community service and a fine. The question arises how adequate the punishment in these cases will be and how the community service will be done under these circumstances.

By analyzing the pattern which seems to be used in reducing the limit of minimum and maximum deprivation of freedom it seems quite simple – the maximum limit of punishment most frequently is decreased by three years for the criminal offence in the respective section to be qualified as by one degree less serious crime thus changing the previous classification or by simply decreasing the existing sanction. For example, for activities aimed at overthrowing the State authority of the Republic of Latvia the maximum term of deprivation of liberty is

planned to be reduced from twenty years to fifteen years; deprivation of freedom for kidnapping a person without qualifying elements is planned to be amended to be reduced from ten to five years. For robbery in case only the basic substance of the crime has been identified it is planned to reduce the existing provision of ten years to five years, and besides providing also for arrest, as well as community service and a fine.

It follows from the above said that robbery in its basic substance will not differ by the damage it inflicts from other forms of robbing another person's property because, for example, for theft and also for robbery a person will be able to be punished both by community service and a fine, true by a somewhat bigger one. If robbery has been committed by using firearms or explosives or if it is associated with inflicting heavily bodily harm to the victim or if it has caused other severe consequences, the minimum time of deprivation of liberty has been reduced from ten to five years, thus irrespective of the fact that the robber has threatened not only material interests of the victim but also health or even life, the offender for that will only face deprivation of liberty for five years.

Without continuing the overview of the planned changes in sanctions because the principles of their determination did not include evaluation of the degree of damage caused and can be understood apparently only by the authors of the draft law, still it must be noted that in separate cases the proposed changes seem strange in general. Take, for instance, deprivation of liberty punishment for eleven years as proposed in the fourth paragraph of Section 175 of the CL, in the third paragraph of Section 177 and in the third paragraph of Section 179 and also in some other sections of the CL. Why not ten or twelve?

Quite disputable and ambiguous[38] is setting of such sanctions that include absolutely all basic punishments provided for in the Criminal law, and after adoption of the draft law there will be 300 sanctions of this type. In this sense one has to agree to D. Hamkova who has written that *"the wide scope of alternative punishments for one and the same offence shows inability of the legislator to determine the real damage of the offence"*[39], which can negatively influence formation of a uniform penal policy.

And finally – resulting from the many amendments the Criminal law will lose its lucidity, when more than 300 changes will be introduced in it, nothing will actually remain in it from the initial Criminal law. But the standing working group continues working industriously discussing continuously new possible changes, quite often replacing recently implemented amendments by new ones or excluding them, therefore it is high time to elaborate a new edition of the Criminal law instead of keeping this codification open and amending it several times during one year.

Summary

1. The criminal penalty policy approved by the Cabinet of Ministers of the Republic of Latvia on January 9, 2009 includes conceptual changes in the penal system on the grounds of which the Ministry of Justice has elaborated a large-scale draft law "Amendments to the Criminal law" planning changes both in provisions of the General and Special part.
2. Elaboration of criminal penalty policy and the amendments following from it in the Criminal law are to be evaluated not merely as a reform of penal policy, which in general is to be recognized as necessary, but also as an activity that will essentially influence the assumptions entrenched in the doctrine and practice of

criminal law about understanding of several institutes of criminal law causing the need to radically revise them.

3. The penal policy concept foregrounds the question about criteria of classification of criminal offences, dividing them into criminal violations and crimes, which in their turn are subdivided into less serious, serious and particularly serious crimes. The author of the present publication opposes to the authors of the draft law and its synopsis that the existing edition of Section 7 of the Criminal law does not correctly indicate this classification criterion because defining types of criminal offences the legislator as if supposedly associated seriousness of a criminal offence with the maximum punishment for the criminal offence, namely, the more severe a punishment has been provided for in the sanction of a section in the Criminal law, the criminal offence is defined in the disposition of the sanction as more serious.
4. In principle not objecting to supplementing the first paragraph of Section 7 of the Criminal law with an reference that criminal offences are divided into criminal violations and crimes depending on the character of the threat and damage posed to an individual or society, which in the author's opinion is to be seen as an amendment of a specifying character, it must be pointed out that it actually follows from theory that the sanction is the very part of a provision of criminal law in which the legislator by taking into account the degree of damage caused by the criminal offence, i.e., the damage incurred or that can be incurred to the interests protected by law, determines for it the type and scope of punishment. Therefore one cannot have positive assessment of the trend seen during the last few years to integrate into provisions of the Criminal law such specifications and even theoretical explanations which should have their place in comments and academic publications.
5. Assessing the proposal to revise understanding of multiplicity and to delete one of its forms – repetition of a criminal offence – it has been concluded that it would be more useful to refuse from repetition as a qualifying element only in the case if a person has already been brought to criminal justice for the previously committed criminal offence and has been punished, recognizing repeated crime as an aggravating circumstance.
6. Analyzing the amendments proposed in the draft law that are to be introduced in the sanctions of provisions of the Special part of the Criminal law, it has been concluded that alternative punishments have been included in all the provisions of criminal law in which the criminal offences are classified as a less serious crime and as a serious crime, if deprivation of liberty for them does not exceed five years without evaluating the character of the threatened interests and damage caused by the criminal offence.
7. It seems that application of community service to soldiers who in view of their status and the time and circumstances of the criminal offence incriminated to them this type of punishment cannot be applied and enacted.
8. One has doubts about usefulness about inclusion in them all the types of basic punishments provided for by the penal system which can negatively influence uniform application of punishments in practice.

The article is devoted to the question of routine changes in Criminal Code of our state, which according to a concept of Criminal punishment policy is provided in rules of General part as well as in rules of Special part. They significantly affect both findings of particular institutions of Criminal Law (established in Criminal

Law doctrine and practice) and determination of punishment of a criminal offence. Within the publication the author's opinion about compliance of certain proposed amendments with theoretical conclusions and needs of practice will be expressed.

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