

# **On Some Developments in Latvian Criminal Law and Criminal Procedure**

*Jānis Rozenbergs*

*Attorney-at-Law*

*Member of the Latvian Council of Sworn Advocates*

*Co-Chair of the Latvian Criminal Bar Association*

Criminal law in Latvia is one of the branches of the law that continuously undergoes considerable change. It is difficult to tell whether this is a function of the constantly evolving and changing needs of the public or the overzealous scholars and practitioners of criminal law who unceasingly propose improvements in the field to the Parliament, which takes heed of all this and then implements the proposals in its legislative activities. I will start by reviewing the developments in the process of improvement of the Criminal Law, and at the conclusion I will address some of the more interesting issues in the improvement process of the Criminal Procedure Law.

After the restoration of national independence, the first significant criminal law reform was completed in 1999, when the Criminal Law took effect and replaced the old Latvian Criminal Code. It can be noted that, since its coming into force in 1999, the Criminal Law has been subjected to constant modification. Between the time the Criminal Law took effect and 1 January 2012, the Criminal Law has been amended on a total of 42 occasions: this means that, on average, the legislature has deliberated amendments to the Criminal Law 3.5 times annually. Essentially, the Criminal Law is a modified Latvian Criminal Code, which in turn had the Criminal Code of the Latvian SSR at its foundation. With the adoption of the Criminal Law, important changes were achieved in the provisions of the General Part relating to criminal law, and the constituent elements of the criminal offences included in the Latvian Criminal Code were revised. At the same time, the repressive system of punishments, inherited from the Soviet years, was preserved in the Criminal Law.

The sentences of deprivation of liberty are far harsher in Latvia than elsewhere in the European Union. The average term of imprisonment in Latvia is just under six years. The figure is around two years in other countries (according to information provided by the Ministry of Justice). Latvia also has a relatively high ratio per 100,000 of the population in terms of those imprisoned at the pre-trial stage or serving a prison sentence. In this regard, we occupy the second place among the 48 European states. A sentence of deprivation of liberty is the most costly of all types of punishment for a government. This tendency has survived since the era of the Soviet Union, when deprivation of liberty had the most significant place among all criminal punishments, and the trend has not declined ever since.

On 12 February 2004, the Law on Amendments to the Criminal Law was adopted, whereby the first significant reform of criminal sentencing was implemented by supplementing the sanctions of many sections in the Special Part with a punishment alternative to deprivation of liberty: community service. Although the above reform was significant, it was not geared at a comprehensive re-evaluation and reform of the sentencing policy.

A pivotal point bringing about a change in the situation was the year 2009, when the Latvian Cabinet approved the Criminal Sentencing Policy Concept developed by the Ministry of Justice, which laid the foundation for conceptual changes in the system of criminal punishment.

Taking into account the solutions proposed in the Concept, the Ministry of Justice developed a draft Law on Amendments to the Criminal Law, which received the support of the Parliament of the Republic of Latvia in the first reading in November 2011. The subsequent approval of the final revision of the draft Law at the Parliament is set to take place during 2012, and it could be expected to take effect in early 2013.

The draft Law can be divided into two blocks. The first block refers to changes in the General Part of the Criminal Law, whereby new criteria and conditions for the application of punishment will be included in it. The second block, in turn, applies to changes in the Special Part of the Criminal Law, where the sanctions of the Sections are significantly amended based on the danger and harm posed by the criminal offences, and some offences are decriminalised.

The draft Law expands, to the greatest extent possible, the potential application of sentences that are alternatives to deprivation of liberty: i.e., fines and community service. The minimum and maximum limits of deprivation of liberty are significantly reduced for crimes. On the other hand, the extent of fines for criminal violations and less serious crimes is significantly raised. There are also categories of criminal offences for which the sanctions cited in the provisions of the law are not significantly affected: the sentences carried by offences such as murder, narcotics trade and sexual offences will remain harsh.

In the conclusion of my review of the latest developments with respect to the Latvian Criminal Law, I wish to turn to one issue in particular which has achieved some prominence during the process of improvement of the Criminal Law, that is, the question regarding the right to the completion of criminal proceedings within a reasonable period and the evolution of this right. Within the context of modern law, the right to a trial within a reasonable time only acquired the status of a basic right in Europe in the middle of the twentieth century. As we know, the first paragraph of Article 6 of the European Convention on Human Rights contains a reference to the right to a trial within a reasonable time as a constituent of the right to a fair trial; subsequently, Article 13 of the Convention prescribes that “everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority”. Despite

such a provision in the Convention, failure to observe the right to a trial within a reasonable time and the lack of effective remedies in the Convention member states in effect create thousands of complaints to the European Court of Human Rights, thus, of course, also slowing down the operations of the ECtHR and rendering it so slow so as to result in these ECtHR cases themselves not being tried within a reasonable time.

This problem of trying cases within a reasonable period has now also become one of the priorities of the Council of Europe. The Commission for Democracy through Law of the Council of Europe, better known as the Venice Commission, which acts as an advisory body to the Council of Europe on matters of constitutional law, released a rather lengthy report in late 2006 on excessive trial terms and effective remedies against them. Furthermore, on 24 February 2010, the Council of Europe Committee of Ministers passed Recommendations for more effective remedies against excessive length of proceedings, which provide guidance to the member states for ensuring reasonable terms of proceedings and proposes effective remedies to be used in instances where the terms are exceeded. This Recommendation offers member states good and potentially useful advice: to take all the possible steps to avoid delays in proceedings; to identify issues that cause the length of proceedings to become excessive; to ensure that there are legal mechanisms in place for accelerating proceedings whose length may become excessive; to ensure that effective remedies or compensatory frameworks exist for instances where the right of an individual to a trial within a reasonable time is violated, proposing that both financial and non-financial mechanisms of compensation are considered, providing for the possibility of terminating proceedings that have become excessively delayed, or providing for the possibility that the applicable punishment be reduced in such instances.

It is possible to recognise that developments in the right to trial within a reasonable time have also taken place in Latvia. Additions to strengthen this fundamental right have been undertaken with the Amendments to the Criminal Law of 21 October 2010, which entered into force on 1 January 2011. Namely, Section 49<sup>1</sup> has been included in the Criminal Law entitled *Determination of Punishment if the Rights to Termination of Criminal Proceedings in Reasonable Term have not been Observed*. This Section states the following:

- (1) If the court determines that the rights of a person to the termination of criminal proceedings in a reasonable term have not been observed, it may:
  - 1) take this circumstance into consideration when determining the punishment and mitigate the punishment;
  - 2) determine a punishment which is lower than the minimum limit provided for the relevant criminal offence by law; or
  - 3) determine another, lesser type of punishment than provided for the relevant

criminal offence by law.

In turn, Paragraph two of the section provides as follows: If the court determines that the rights of a person to the termination of criminal proceedings in reasonable term have not been observed and the person has committed a crime, for which the death penalty or life imprisonment is provided for in the sanction of the Special Part of the Criminal Law, the court may determine a deprivation of liberty for twenty years instead of the death penalty or life imprisonment.

In addition, Section 58 of the Criminal Law (*Release from Criminal Liability*) has been supplemented with Paragraph five, which states: A person may also be released from criminal liability if it is established that his or her rights to the termination of criminal proceedings in a reasonable term have not been observed.

One could add that the introductions of such legal provisions in Latvia were adopted with approval by representatives of various legal professions: judicial, prosecutorial bodies and, of course, attorneys.

The Latvian Criminal Law – just as, to my mind, the criminal legislation of most other European countries – does not provide for such reasonable terms as a specific number of years or months. How, then, is the reasonableness of the length of criminal proceedings to be assessed? In its judgments, the European Court of Human Rights has always pointed out that the reasonableness of the length of proceedings is to be assessed by considering the circumstances of the case, and in particular the following criteria: the complexity of the case, the behaviour of the individual him- or herself and the competent bodies and officials, as well as the issue of the interests that have been violated. The latter criterion is especially important in criminal cases: it considers the injury of the particular personal rights and values of a person against whom criminal proceedings are directed. With respect to these criteria, one can refer, for example, a very recent Judgment of the European Court of Human Rights in the matter *McFarlane v Ireland* (§ 140), of 10 September 2010, as well as the Judgment of 29 March 2006 in *Scordino v Italy*<sup>7</sup> (§ 177), but it has to be noted that these criteria can be found in many judgments of the European Court of Human Rights, and they have featured steadily in the case-law of the recent years and have not changed.

In connection with the termination of criminal proceedings and release from criminal liability, one also needs to draw attention to the provision of the Latvian Criminal Procedure Law, that when a person is released from criminal liability, the criminal proceedings may not be terminated if the person who has committed the criminal offence objects to it. In other words, the termination of criminal proceedings in connection with the violation of a reasonable term is only possible with the consent of the perpetrator. And this is for the reason that a circumstance of this kind as a basis for the termination of criminal proceedings is non-rehabilitative, i.e., it is directly related to the establishment of an individual's guilt. This also directly emerges from the Section of

the Criminal Procedure Law listing circumstances that are rehabilitative with respect to a person. That is, if a person does not admit his or her guilt in committing a criminal offence, then the person would have no grounds for agreeing with the termination of the criminal proceedings against him or her on this non-rehabilitative basis, namely, due to the failure to observe a reasonable term of proceedings, but would rather have to object to it in order to achieve his or her own rehabilitation – the termination of the criminal proceedings on other, rehabilitative grounds, or on the grounds of an acquittal. As I conclude on this matter, I would like to express the hope that, in the attempts to ensure the completion of proceedings within a reasonable time, no other fundamental rights of accused individuals will be affected, such as the right to an impartial hearing or the right to defence. In its report on the issue, the Venice Commission has noted that the position regarding the reasonableness of the term of a trial should at any rate be in proportion with the right to a fair trial. A sensible balance is required between an individual's procedural rights and guarantees that are inevitably related to the time objectively required for the implementation thereof, which cannot be reduced for the sole purpose of achieving faster adjudication of the case. In accordance with this position, Article 6(1) of the Convention requires termination of the proceedings within a reasonable time, where such a conception of reasonableness would also have to reflect the necessary balance between speedy proceedings and a fair trial.

In the following I will provide a brief overview of the developments in the criminal procedure legislation of Latvia. The Latvian Criminal Procedure Law was adopted on 21 April 2005, and it took effect on 1 October 2005, that is, some seven years ago. During this time, the Latvian Parliament has amended the Law a total of 13 times, which means an average of twice a year, with more than a half of the 847 Sections of the Criminal Procedure Law amended and supplemented overall. The most recent large-scale and significant amendments to the Latvian Criminal Procedure Law were adopted in October 2010, and they affected just over 100 Sections of the Law. The following could be seen as the most significant changes effected with the said amendments.

- 1) The range of instances where a defence counsel's presence at the adjudication of a case is mandatory has been expanded, providing that the participation of a defence counsel is compulsory in cases that are adjudicated without the presence of the accused at the court hearing.
- 2) Also, the adjudication of cases without the participation of the accused has been subject to significant change. As these amendments have taken effect, cases of any criminal violation (i.e., criminal offences for which the Criminal Law provides a sentence of deprivation of liberty not exceeding two years or a lighter punishment) may be adjudicated without the participation of the accused. A case can be adjudicated without the participation of the

accused if the accused has requested for the case to be adjudicated without his or her presence, as well as where the accused repeatedly fails to appear at a court hearing without a valid justification. In all such instances the participation of a defence counsel at the adjudication is compulsory.

- 3) Amendments have been made to the provisions relating to attorneys as representatives of the injured party in criminal proceedings. Whereas it was previously stipulated that an attorney shall certify his or her authority to represent the victim by a written power of attorney, since the coming into force of these amendments, the filing of an advocate's warrant is considered sufficient (an advocate's warrant in Latvia is a notification of certain content and form signed unilaterally by the attorney him- or herself, whereby the attorney confirms to those concerned that he or she is providing legal assistance to a specific client). Although such a procedure to some extent facilitates the processing of the representation by an attorney as a representative of the victim, in practice such amendments have brought about more difficulty than convenience. To wit, it is impossible to draw conclusions from such an advocate's warrant regarding the scope of the representation with which the victim has been willing to entrust the attorney, which often leads to disagreements as to whether or not the attorney is entitled, say, to conclude a settlement with the accused on behalf of the victim, to submit and maintain an application for compensation of damages as part of a criminal case for the harm caused to the victim, etc.
- 4) Adjudication of criminal cases according to appellate procedure in written proceedings has been introduced,
  - a. if only a petition to reduce the sentence imposed is made in the appellate complaint to the court; or
  - b. if the appellate complaint notes procedural violations due to which the judgment of the first instance is to be repealed;
  - c. and in both aforementioned instances: if the accused and the public prosecutor do not object to the adjudication of the case in written proceedings.
- 5) Significant clarifications have been applied to provisions that govern the amendment of the indictment during the trial. In fact, amendments to the indictment made by the public prosecutor during the trial, as well as withdrawal from the indictment brought by the prosecutor in the court judgment, has been one of the most discussed issues for a number of years, in case-law as well as at various conferences and in scientific publications, and most often in the context of the right to a defence and the right to know the content of one's charges.
- 6) The exclusion of criminal proceedings based on private prosecution from the criminal

procedure system altogether can probably be considered the most important among these amendments to the Criminal Procedure Law, whereby a whole chapter was struck from the Law. Criminal proceedings in private prosecution cases were known in Latvia in the pre-war period before 1940, during the Soviet occupation until 1990, as well as in the restored Republic of Latvia since 1990. Criminal proceedings in private prosecution cases, which did not include a pre-trial investigation and where the victim him- or herself maintained the indictment in court, was possible for a number of types of criminal violations: defamation, bringing into disrepute, light bodily injuries. In the recent years, fairly detailed studies of such private prosecution criminal proceedings were conducted by the Ministry of Justice and invited experts, and in the course of this research a generally shared opinion emerged that this type of criminal proceedings creates more complications and issues that are either difficult to resolve or sometimes impossible to resolve in proper legal manner than it contributes to the fair regulation of criminal and legal relations. It was therefore decided that all the problems associated with the criminal proceedings in private prosecution cases are easiest dealt with by abolishing this type of proceedings altogether. I personally support and welcome such a solution. Since 2011, only public criminal proceedings have been conducted with respect to all violations of the Criminal Law, which in certain instances (i.e., for less serious personal injury) the State is entitled to initiate and continue only if the victim so desires.

It is conceivable that representatives of many so-called “old” EU Member States would find that such an abundance of amendments to a law indicates a frivolous attitude towards the drafting of laws in Latvia. This may also be the case. Yet, I personally do not see anything reproachable in the fact that the legislature also finds itself in continuous contact with the parties that apply the law and is prepared to hear and consider valid proposals from the executors of the laws regarding improvements to a certain area.