



# THE CONSTITUTIONAL COURT OF THE REPUBLIC OF LATVIA

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## DECISION ON TERMINATING LEGAL PROCEEDINGS

in Case No. 2021-34-01

*In Riga*

*On 27 May 2022*

The Constitutional Court of the Republic of Latvia, comprised of: chairperson of the court hearing Aldis Laviņš, Justices Irēna Kucina, Gunārs Kusiņš, Jānis Neimanis, Artūrs Kučs, and Anita Rodiņa,

having regard to Deniss Barteckis' constitutional complaint,  
on the basis of Article 85 of the *Satversme* of the Republic of Latvia and Para 1 of Section 16, Para 11 of Section 17 (1), as well as Section 19<sup>2</sup> and Section 28<sup>1</sup> of the Constitutional Court Law,

on 27 April 2022, examined in written procedure the case

**“On the compliance of Section 82 (1) of the Criminal Law in the wording which was in force from 1 April 2013 until 10 May 2016 with the first sentence of Article 100 of the *Satversme* of the Republic of Latvia, and on the compliance of the transitional provision of the law of 21 April 2016 “Amendments to the Criminal Law” with Article 1 and the second sentence of Article 92 of the *Satversme* of the Republic of Latvia”.**

### **The Constitutional Court of the Republic of Latvia established:**

1. On 17 June 1998, the *Saeima* adopted the Criminal Law, which entered into force on 1 April 1999. Chapter X of the Criminal Law defines criminal liability for crimes against the State.

Section 82 (1) of the Criminal Law, in the wording that was in force from 1 April 2013 until 10 May 2016 (hereafter – the contested norm of the Criminal Law), provided: “For public invitation to destroy the independence of the Republic

of Latvia as a state, aimed at incorporating Latvia into a single state formation with another state or liquidating it in another way, the applicable punishment shall be deprivation of liberty for a term of up to three years, or short-term deprivation of liberty, or community service, or a fine, with or without a probationary supervision for the period of up to three years.” The law of 21 April 2016 “Amendments to the Criminal Law”, which entered into force on 11 May 2016 (hereafter – Amendments of 21 April 2016), *inter alia*, expressed Section 80, 80<sup>1</sup> and 81 in new wording, whereas Section 82 was deleted from the law. The transitional provision of the aforementioned law (hereafter – the contested transitional provision) provides: “Provisions of this Law shall not apply to individuals who committed a criminal offence before the date of coming into force of this law.”

Section 81 of the Criminal Law, in the currently valid wording, provides that a public invitation to take action against national independence, sovereignty, territorial integrity, State authority or administrative order of the Republic of Latvia in a manner that is not provided for in the *Satversme* of the Republic of Latvia or for distribution of materials containing such invitation, the applicable punishment is the deprivation of liberty for a term of up to five years or short-term deprivation of liberty, or probationary supervision, or community service, or fine.

**2. The applicant – Deniss Barteckis** (hereafter – the Applicant) – was recognised as being guilty of committing the criminal offence provided for in the contested norm of the Criminal Law and was punished by 80 hours of community service and probationary supervision for the period of one year. The Applicant holds that the contested norm of the Criminal Law, insofar it provided for criminal liability for public invitation to destroy the independence of the Republic of Latvia as a state in a way not provided for in the *Satversme* of the Republic of Latvia (hereafter – the *Satversme*), is incompatible with the first sentence of Article 100 of the *Satversme*. Likewise, the Applicant holds that the contested transitional provision is incompatible with Article 1 and the second sentence of Article 92 of the *Satversme* since it does not provide for retroactive effect.

**2.1.** The Applicant had created on a website invitation, comprising an invitation in Russian, translated as follows: “Addressing all inhabitants of Latvia: Collection of signatures in favour of Latvia’s accession to the USA.” He had placed a reference to this petition also in his profile in the social network *Facebook*. Allegedly, the Applicant’s aim, in creating this invitation, had been to draw society’s attention to the fact that another person, who had placed on a website

invitation to incorporate Latvia into the Russian Federation, had been sentenced by the first instance court to deprivation of liberty for the term of six months.

The restriction on the right to freedom of speech, set out in the contested norm of the Criminal Law, had been established by law and is said to have legitimate aims, i.e., protecting the democratic state order and public security. Likewise, the chosen measure, in general, is said to be suitable for reaching these legitimate aims; however, it is contended that the established restriction is not proportionate since its legitimate aims could be reached by other measures, less restrictive upon an individual's rights.

In cases where, although unlawfully, non-violent invitations to radical constitutional changes are made, criminal penalties should not be applied automatically, assessment of proportionality should be compulsory, in compliance with the judicature of the European Court of Human Rights. However, the contested norm of the Criminal Law does not impose upon a court the obligation to examine proportionality within the framework of a specific case. Criminal liability could be envisaged only with respect to cases when invitations are made to destroy the independence of the state by violence or by rejecting principles of democracy. Due to these considerations, the legislator adopted the Amendments of 21 April 2016, *inter alia*, adding to the disposition of Section 81 of the Criminal Law, the words "in a manner that is not provided for in the *Satversme* and, thus, eliminating the incompatibility of the contested norm of the Criminal Law with the first sentence of Article 100 of the *Satversme*.

**2.2.** By the Amendments of 21 April 2016, the legislator has recognised a public invitation to turn against the independence of the Republic of Latvia as a state in a manner envisaged in the *Satversme* as not being criminally punishable. However, the contested transitional provision is said to provide for a derogation from the criminal law principle of retroactive effect of a provision favourable to a person and, thus, the Applicant had been made criminally liable and punished in accordance with the contested norm of the Criminal Law. The Applicant holds that the derogation from the aforementioned principle, which had been made in the adoption of the contested transitional provision, is unfounded.

The Applicant draws attention to the fact that, allegedly, it follows also from the Supreme Court's judicature that the contested norm of the Criminal Law had provided for criminal liability, irrespectively of whether the public invitation had been directed at destroying the independence of the Republic of Latvia as a state in a manner provided for or not provided for in the *Satversme*.

The Applicant notes that Article 77 of the *Satversme* provides: if the *Saeima* has amended Article 1 of the *Satversme*, such amendments, in order to come into force as law, must be approved by a national referendum. Allegedly, the independence of the Republic of Latvia can be denounced in a manner provided for in the *Satversme*, i.e., through a national referendum. This finding is said to be confirmed by the Constitutional Court's judicature. The opinion that the legislator cannot denounce the independence of the State of Latvia has been expressed in legal doctrine; however, the Applicant holds that this opinion is incompatible with the findings expressed in the Constitutional Court's judicature.

The contested norm of the Criminal Law is said to prohibit also such activities which the *Satversme* permits. This contradiction between what is permitted by the *Satversme* and what is prohibited by the Criminal Law might result in a person's inability to understand the content of the rights and obligations that follow from the legal regulation and to foresee the legal consequences of its application. In the particular circumstances, the principle of legal security does not require maintaining the applicability of the contested norm of the Criminal Law; however, this principle in conjunction with the criminal law principle of the retroactive force of a provision that is favourable to a persons is said to require elimination of the contradiction with the *Satversme* and application of the new regulation as soon as possible.

**3. The *Saeima*, the institution that issued the contested act,** holds that the contested norm of the Criminal Law complies with the first sentence of Article 100 of the *Satversme*, whereas the contested transitional provision is compatible with the Article 1 and the second sentence of Article 92 of the *Satversme*.

**3.1.** The contested norm of the Criminal Law prohibits from expressing one's opinion in a certain manner about a particular matter; however, in the present case, it should be assessed, first and foremost, whether the rights, guaranteed in the first sentence of Article 100 of the *Satversme*, indeed, protect certain expressions. To differentiate between such public expressions that are protected by the freedom of speech from such public expressions that are not protected by the freedom of speech, the international human rights law uses such concepts as "abuse of rights" and "prohibition to abuse rights". The prohibition to abuse rights is said to be enshrined in the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereafter – the Convention), the International

Covenant on Civil and Political Rights (hereafter – the Covenant) and the Universal Declaration of Human Rights, and, in the judicature of the European Court of Human Rights, this prohibition has been applied in the context of the freedom of speech. The *Saeima* holds that, pursuant to the understanding that is recognised in international human rights law, public expressions of a certain type are not protected by the freedom of speech, even if they do not comprise a direct call for violence.

The *Saeima* is of the opinion that the contested norm of the Criminal Law, substantially, envisages criminal liability for such public expression, which not only calls for unlawful actions because there are no such measures that could terminate the existence of the Latvian State but also for action, which is manifestly incompatible with the *Satversme*, and such public invitation does not deserve the protection of the first sentence of Article 100 of the *Satversme*. Moreover, the Criminal Law provides for criminal liability also for other public expressions, which are not protected by the freedom of speech because they are manifestly contrary to the values that are generally recognised in a democratic state. Hence, the *Saeima* holds that the contested norm of the Criminal Law does not infringe upon the Applicant's rights.

However, if the Constitutional Court were to consider that the first sentence of Article 100 of the *Satversme* protects public invitations to destroy the independence of the Republic of Latvia as a state, then it would have to be taken into account that the right to the freedom of speech is not absolute. The *Saeima* holds that the restriction on fundamental rights, included in the contested norm of the Criminal Law, has been established by law and has two legitimate aims – protection of the democratic state order and public security, that this restriction is directed at preventive protection of the independent state of the Republic of Latvia, and that the measure chosen by the legislator is suitable for reaching the legitimate aims.

In assessing the proportionality of the restriction on fundamental rights, the historical experience of the Republic of Latvia and its national security situation at the time when the contested norm of the Criminal Law was in force and at the time when the Applicant committed the criminal offence should be taken into consideration. Likewise, the practice of applying the contested norm of the Criminal Law also should be taken into account, as well as the fact that, pursuant to 2016 Report of the State Security Service, in the respective year, there had been

only single criminal proceedings related to invitation to destroy the independence of the Republic of Latvia as a state.

Envisaging criminal liability for certain actions is said to have, first and foremost, preventive effect. Therefore, in the context of effectiveness, comparing criminal liability with such coercive measures, the application of which does not cause criminal law consequences to a person, is said to be incorrect. Other coercive measures do not allow reaching the legitimate aims of the particular restriction on fundamental rights in the same scope. To safeguard its independence and democratic order, the State has the right to assess independently the degree of threats and decide on retaining the restriction. The *Saeima* is of the opinion that there are no other, more lenient measures that would allow reaching the legitimate aims of the restriction on fundamental rights at least in the same quality.

Public invitation to destroy independence of the Republic of Latvia as a state cannot be assessed as invitation to changes of constitutional nature because the *Satversme* does not provide for a lawful way for destroying the independent statehood of the Republic of Latvia. Moreover, the contested norm of the Criminal Law does not envisage criminal liability, for example, for exchange of opinions on whether the *Satversme* allows liquidation of the Republic of Latvia and whether a situation like that is even possible. This norm does not set out criminal liability for collecting signatures in favour of a national referendum on introducing such amendments to the *Satversme* that would envisage, for example, deleting Chapter VIII of the *Satversme*. This norm does not envisage criminal liability even for an invitation to adopt new *Satversme*, insofar the democratic state order and the State proclaimed on 18 November 1918 are retained. The contested norm of the Criminal Law is said to envisage criminal liability for only one specific activity – purposeful invitation expressed to other persons to destroy the independence of the Republic of Latvia as a state, whereas the way, in which those who are expressing this invitation intend to do it, is of no relevance.

The *Saeima* believes that such public invitation as the one expressed by the Applicant cannot be part of democratic debates and that such invitations, to a greater or lesser extent, sooner or later, may cause a risk of violent take-over of the state power and might lead to the liquidation of the independence of the Republic of Latvia as a state

It is contended that the public benefit from the restriction on fundamental rights, included in the contested norm of the Criminal Law, significantly outweighs the restriction upon rights – possible threats to the independence of the Republic

of Latvia as a state are preventively eliminated, thus, allowing members of society to continue living in a democratic state governed by the rule of law. Severe legal liability sets in for public invitation to destroy the independence of the Republic of Latvia as a state; however, sufficiently differentiated criminal penalties have been envisaged for this criminal offence. The independent statehood of the Republic of Latvia is too important to be subject to risk, without envisaging criminal liability for public invitation to destroy it.

**3.2.** The *Saeima* holds: the fact that a qualifying feature, i.e., “in a manner not provided for in the *Satversme*”, has been included in Section 81 (1) of the Criminal Law has no legal significance with respect to the Applicant because he had publicly invited turning against the independence of the Republic of Latvia as a state in a manner not provided for in the *Satversme*. It is possible to turn against the state order in a manner provided for in the *Satversme*, for example, by collecting signatures with the aim of initiating a national referendum for introducing such amendments to the *Satversme* that would change the state order of Latvia from parliamentary to presidential; however, it is impossible to destroy the independence of the Republic of Latvia as a state in a manner provided for in the *Satversme*. Thus, the Amendments of 21 April 2016 did not introduce rules that would be more favourable to the Applicant.

**4. The summoned person – the Ministry of Justice** – holds that the contested norm of the Criminal Law complies with the first sentence of Article 100 of the *Satversme* and that the contested transitional provision is compatible with Article 1 and the second sentence of Article 92 of the *Satversme*.

The Ministry of Justice subscribes to the arguments presented in the written reply by the *Saeima* and, in addition, notes that the standing working group of Criminal Law of the Ministry of Justice has examined and supported the proposals by the Minister for the Interior that had been submitted prior to the second reading of the draft law “Amendments to the Criminal Law” (No. 514/Lp12) and envisaged adding to the disposition of Section 81 of the Criminal Law the words “in a manner not provided for in the *Satversme*”, as well as adding the contested transitional provision to the law.

The disposition and sanctions for criminal offences envisaged in Chapter X of the Criminal Law “Crimes against the State” had been significantly changed by the Amendments of 21 April 2016, and the contested transitional provision had been necessary to ensure reasonable and balanced transition from the old legal

regulation to the new legal regulation, *inter alia*, also to prevent a situation where, after these amendments had come into effect, sentenced persons would attempt to interpret the regulation in way that due to the changes in the description of the constituent elements of a criminal offence the retroactive effect of the law should be applied to them.

Section 81 of the Criminal Law is said to be broader, its content not restricted only to the purpose of the criminal offence to incorporate Latvia into a single state formation with another state, it envisages also stricter sanction of deprivation of liberty and, thus, is more unfavourable to a person compared to the contested norm of the Criminal Law. Whereas the words, included in the contested norm of the Criminal Law, “for public invitation to take action against the independence of the Republic of Latvia as a state” also presume invitation to take action against the independence of the Republic of Latvia as a state in a manner not provided for in the *Satversme*.

**5. The summoned person – the Ministry of the Interior** – upholds the statements made in the *Saeima*’s written reply and is of the opinion that the contested norm of the Criminal Law complies with the first sentence of Article 100 of the *Satversme* but the contested transitional provision is compatible with Article 1 and the second sentence of Article 92 of the *Satversme*.

**6. The summoned person – the Ombudsman** – holds that the contested norm of the Criminal Law complies with the first sentence of Article 100 of the *Satversme* but the contested transitional provision is compatible with Article 1 and the second sentence of Article 92 of the *Satversme*.

**6.1.** The Ombudsman is of the opinion that the restriction on fundamental rights, included in the contested norm of the Criminal Law, has been established by law and has legitimate aims – protection of the democratic state order and public security, the chosen measure is suitable for reaching the legitimate aims, and these legitimate aims cannot be reached by measures that are less restrictive upon a person’s rights.

The Ombudsman is of the opinion that, in assessing proportionality, it should be taken into account that the national independence of Latvia, its democratic state order and territorial integrity are part of the inviolable core of the *Satversme*.

The protected interests are said to create preconditions for protecting other persons' human rights and freedoms, and the penalty, included in the contested norm of the Criminal Law, is said to belong to the instruments of a militant democracy, which allows preventive actions by the State in order to prevent threats to a democratic state order.

Norms of the Criminal Law restrict both peaceful and also such public invitations that call for the use of violent methods, and their different impact on the created threat to the democratic state order can be taken into account in envisaging different scope of penalties. The Ombudsman holds that the threat of violence is significant, in assessing the possibility to apply Article 17 of the Convention, which, accordingly, would permit a more severe form of liability in the national law.

Likewise, it should be taken into consideration that such invitation, for which the contested norm of the Criminal Law envisages criminal liability, substantially, is linked not only to expressing an opinion on the need for Latvia's independence or choice of a particular constitutional form but, intentionally, is linked to provoking action aimed at changing the basic constitutional values. The Ombudsman holds that peacefully expressed opinions on the issues of Latvia's constitutional identity should be differentiated from targeted invitation addressing like-minded people to unite in order to overthrow the democratic order. In this regard, the practice of applying the contested norm of the Criminal Law should be taken into account.

In assessing proportionality, Latvia's geopolitical situation and the threats of hybrid war also should be taken into account. The scope of applied penalty is also significant. However, primarily, this is the task of the party applying the law, in determining appropriate punishment. The contested norm of the Criminal Law is said to be sufficiently flexible to allow taking into account, for example, the relevant political context at the time when the offence is committed, which can impact the intensity of the existing threat and, accordingly, influence the applicable penalty. The Ombudsman holds that the restriction on a person's individual right to the freedom of speech outweighs the threat caused by the spread of discourse related to the change of Latvia's territorial integrity in society.

**6.2.** In adopting the contested transitional provision, the matter of offences that should be recognised as criminally punishable in the future has been seen as being of particular importance, and a clear aim of the normative regulation can be derived from the preparatory materials of the law, as well as the substantiation for

the choice of not granting retroactive effect to the particular legal norm. If the case law does not differ and Section 81 of the Criminal Law, substantially, comprises also the previous regulation, then the principle of retroactive effect of a rule favourable to a person has not been violated.

**7. The summoned person – the Cabinet’s Representative to International Human Rights Organisations** – notes: in assessing whether the restriction has been established by law, not only whether the restriction has been included in a generally accessible regulatory enactment but also whether the respective law is qualitative should be taken into account, i.e., whether it is clear and comprehensible so that a person would be able to foresee the consequences of its application and adjust their behaviour accordingly; likewise, whether the legal provision does not create the risk of significantly different application or interpretation. As regards the need for the restriction, in turn, the finding made by the European Court of Human Rights that states that refer to protection of the State or public security as the legitimate aim of a restriction may not refer to abstract threats should be taken into account. Namely, only particular interests that are under threat are protected.

Although the *Satversme* does not comprise a norm analogous to Article 17 of the Convention, prohibiting abuse of rights, this principle should be taken into consideration in assessing the proportionality of a restriction. Pursuant to the judicature of the European Court of Human Rights, the purpose of Article 17 of the Convention is to deny persons or groups of persons the possibility to justify or engage in such actions that are directed at destroying the rights and freedoms, enshrined in the Convention, as well as participate in such actions. Thus, essentially, the principle of militant democracy is reflected in this article of the Convention. However, a very high threshold has been set for the application of this article and it is applicable only to statements that are manifestly contrary to the letter and the spirit of the Convention, are incompatible with democracy and other values, enshrined in the Convention or the Preamble to it, or such statements that infringe upon or interfere with the rights and freedoms, enshrined in the Convention.

Generalisation of the case law of the European Court of Human Rights allows concluding that the Convention does not prohibit states from envisaging penalties for statements that include invitations to destroy national independence

because, in some instances, such statements may be considered as abuse of the freedom of speech, guaranteed in the Convention.

However, in deciding on the application of Article 17 of the Convention, the European Court of Human Rights attaches great importance to the content of the particular statement, as well as the broader context of the facts of the case because only more extensive analysis of the circumstances in the case allows differentiating between shocking and provoking behaviour, which enjoys the Convention's protection, from such behaviour that is unacceptable in a democratic society. Both the Applicant and the *Saeima* refer to the findings from the judicature of the European Court of Human Rights that also shocking, offensive and provocative statements enjoy the Convention's protection. However, these findings from the judicature of the European Court of Human Rights, as well as the penalties applied in the framework of the criminal proceedings, which is the basis for the present case, are attributable also to aspects in the application of the contested norm of the Criminal Law.

Several other aspects have been indicated as part of proportionality review in the judicature of the European Court of Human Rights, for example, the content of and the manner of making the statement, i.e., whether the statement has been made in good faith and was ethical, as well as the personal motivation of the particular individual, because when the freedom of speech is used for personal aims or for the purpose of confrontation or antagonization it does not enjoy as high level of protection as in those cases where it is exercised in good faith and in public interests. Likewise, the European Court of Human Rights conducts particularly detailed analysis of those cases where the right to freedom of speech has been exercised with the aim of facilitating debates on socially relevant issues or problems. However, these aspects noted in the judicature of the European Court of Human Rights should be attributed to the constituent elements of a criminal offence. Therefore these, similarly to the issues relating to the applied penalties and their comparison, in view of the fact that these elements have been incorporated in the Criminal Law in a systemic way, should be revealed and proven in the framework of criminal proceedings during the pre-trial period and adjudication of the case.

The examples found in the judicature of the European Court of Human Rights relating to Article 7 of the Convention are predominantly linked to the application of the "negative" aspect of this provision. However, prohibition to states to define exceptions to the application of "favourable retroactive effect", i.e.,

prohibition to include into the national legal provisions norms identical to Section 5 (2) of the Criminal Law, should not be “read into” Article 7 of the Convention. Arguments as to whether Section 81 of the Criminal Law provides for a more favourable wording of the disposition to the Applicant, are essential for correct understanding of the content of this norm; however, *prima facie*, these would be applicable to revealing the content of this norm in the process of its application rather than in constitutional review.

**8. The summoned person – the Latvian Centre for Human Rights** – holds that the wording of the contested norm of the Criminal Law is too broad and, insofar it envisages application of criminal penalty for any invitation to destroy the independence of the Republic of Latvia as a state, without assessing the degree of threat, caused by it, on its merits, is incompatible with the first sentence of Article 100 of the *Satversme*.

Allegedly, the contested norm of the Criminal Law specifies neither the type nor the nature of the invitation, nor the context, in which it is made. Thus, different kinds of speeches, *inter alia*, a political speech may fall within the scope of this norm. In view of the historical context of the Latvian State, as well as the current geopolitical situation, the summoned person holds that criminal liability for invitations to destroy the independence of the Republic of Latvia as a state is suitable for reaching the legitimate aim; however, it doubts whether application of a criminal penalty for any invitation with this content is a proportionate measure for reaching this legitimate aim.

Invitations to destroy the national independence cannot be assessed in the same way as hate speech because, as to their nature, they differ, i.e., hate speech, basically, is directed at various societal groups. In certain circumstances, though, invitations to destroy the national independence could be part of propaganda of ideology hostile to democracy and human rights. However, in such a case, the degree of threats caused by particular invitations should be assessed.

The Latvian Centre for Human Rights holds that the following significant legal elements serve to differentiate expression of opinion from public invitation, for which criminal liability could be envisaged: geopolitical situation in the region, the public influence and recognisability of the person issuing the invitation, the way in which the invitation is distributed, insistence, as well as the form of invitation. Moreover, these elements should be weighed differently, depending on the current relevant issues in the context of external threats to the state.

**9. The summoned person – the Latvian Council of Sworn Advocates –** is of the opinion that the contested norm of the Criminal Law is compatible with the first sentence of Article 100 of the *Satversme* but the contested transitional provision complies with Article 1 and the second sentence of Article 92 of the *Satversme*.

In view of the case law of the European Court of Human Rights, it can be concluded: in some cases, when the invitation expressed by the person is directed at establishing a new, non-democratic state, such invitation is not protected by the right to the freedom of speech and, thus, by making a person criminally liable and punishing them, the rights, included in the first sentence of Article 100 of the *Satversme*, are not restricted. However, in those cases, which fall within the scope of the contested norm of the Criminal Law but, in compliance with the current case law of the European Court of Human Rights, cannot be considered as being extreme it should be taken into account that the State has the right to take special self-defence measures to guarantee the stability and effectiveness of the democratic system.

The Latvian Council of Sworn Advocates considers: it follows from the legislative materials that the legislator's aim, in adopting the Amendments of 21 April 2016, was not to decriminalise certain actions, and this was not done even when an reference to conducting activities "in a manner not provided for in the *Satversme*" was added to the disposition of Section 81 of the Criminal Law.

The contested norm of the Criminal Law, which had not specified the manner of conducting the criminal activities referred to in the disposition of the section, cannot be interpreted to mean that invitation directed at destroying the Republic of Latvia would not be punishable if the *Satversme* were to admit such an invitation. The Applicant had not been punished for decriminalised criminal activity because the content of the contested norm of the Criminal Law had not been changed. In no case, this norm had envisaged criminal liability for public invitation to destroy the national independence of the Republic of Latvia in a manner provided for in the *Satversme*. Thus, respecting the limits of the claim, it should be recognised that the contested norm of the Criminal Law complies with Article 100 of the *Satversme*.

The scope of the contested norm of the Criminal Law is said to be narrow; i.e., it envisages making a person liable and punishing a person not for inducement

to radical constitutional changes but for invitation to destroy the independence of the Republic of Latvia as a state

The Criminal Law is said to protect the most essential interests of the State, society, and an individual. The existence of Latvia as a state formation is one of the main societal values, due to, in particular, specific historical and political circumstances. Moreover, the restriction, included in the contested norm of the Criminal Law, is said to be aimed at the positive aspect of the freedom of speech, i.e., expression of an opinion, views, which, in difference to the negative aspect of the freedom of speech, potentially may result in actions aimed at terminating the existence of the state.

The sanction defined in the contested norm of the Criminal Law is said to be sufficiently broad and allowing those applying this legal norm to choose the appropriate type of punishment. Thus, even in cases that fall within the scope of the right to freedom of speech, the restriction is validly needed for public interests, i.e., it is justifiable.

Since the contested norm of the contested Criminal Law was in its entirety included in Article 81 of the Criminal Law and the reference “in a manner not provided for in the *Satversme*” has not changed the content of the respective legal norm, in the present case, the pre-conditions for applying the principle of the retroactive effect of a favourable rule are not met. The Latvian Council of Sworn Advocates assumes that the aim of the contested transitional provision is to underscore that the new legal norm, which is included in Article 81 of the Criminal Law, does not differ from the contested norm of the Criminal Law, and, thus, the legislator had wished to ensure clarity for the addressees of the legal norms during the transitional period.

**10. The summoned person – *Dr. habil. iur. Uldis Krastiņš*** – notes: it is not disputed that in those cases where the new law recognises the entire criminal offence as unpunishable it has retroactive effect. However, a different situation occurs only if the new law, as before, recognises one of the activities set out in the revoked law as being criminally punishable. Such a situation had developed with respect to Section 81 of the Criminal Law and the contested norm of the Criminal Law because both these norms provide for criminal liability for public invitation to turn against the territorial unity of the Republic of Latvia.

Section 5 of the Criminal Law provides that this section deals with the criminality of an offence (act or failure to act). In criminal law, act, as one of the

features of the objective side of a criminal offence, is understood as any act envisaged in the disposition of the particular section in the Special Part of the Criminal Law. This is said to mean that if the disposition of a criminal law provision envisages several criminally punishable alternative acts then each of them may constitute an independent criminal offence.

In the meaning of criminal law, a person's intentional, active, harmful and unlawful actions, through which a person exercises their own will and that lead to threat to interests under legal protection, envisaged in the Criminal Law, is considered to be a criminal act. The issue of the retroactive effect of the criminality of an act, set out in the contested norm of the Criminal Law, only with respect to unlawful action, which had been manifested as public invitation to turn against the territorial unity of the Republic of Latvia, should be resolved in exactly this sense.

The fact that the words "in a manner not provided for in the *Satversme*" had been added to the feature of the constituent elements of crime, envisaged in Section 81 of the Criminal Law, purportedly does not mean that liability for this crime had not been envisaged in the contested norm of the Criminal Law. Territorial unity is the foundation of the independence and self-dependence of every sovereign state. The *Satversme* has proclaimed the territory of Latvia as being united and indivisible. Likewise, the *Satversme* also provides that changes to the territory of the Republic of Latvia may be made only by the *Saeima* and only through a national referendum.

The contested norm of the Criminal Law had envisaged liability for invitation to destroy the independence of Latvia as a state by incorporating Latvia into a single state formation with another state as the result of any unlawful action. Thus, any action that threatens the independence of Latvia as a state and is directed against the territorial unity of the State of Latvia, was deemed to be unlawful and punishable as all crimes envisaged in the Criminal Law. This, allegedly, means that there are no legal grounds for asserting that the legislator had not included among unlawful actions, which constitute the features of the crime, envisaged in the contested norm of the Criminal Law, liability for such actions as public invitation to turn against Latvia's territorial unity in a manner not provided for in the *Satversme*. A conclusion to the contrary would be incompatible with the *Satversme*. The abovementioned leads to the conclusion that the actions referred to in the revoked norm were not recognised as being unpunishable, by including a new norm in the Criminal Law. Also the contested norm of the Criminal Law, similarly to Section 81 of the Criminal Law, defines liability for act, which in both

cases threatened the territorial unity of the state, enshrined in the *Satversme*, to equal extent. The reference “in a manner not provided for in the *Satversme*” only specifies the kind of the invitation expressed, i.e., the way in which the offence (act) directed against the territorial unity of the Republic of Latvia manifested itself, without changing the content and meaning of this act.

As regards the contested transitional provision, it can be concluded that the retroactive effect is excluded by the fact that both the contested norm of the Criminal Law and the subsequent Section 81 of the Criminal Law envisage criminal liability for public invitation to turn against the territorial unity of the Republic of Latvia.

**11. The summoned person –*Dr. iur. Diāna Hamkova, Docent at the Department of Criminal Law of the Faculty of Law, the University of Latvia*** – holds that the contested norm of the Criminal Law complies with the first sentence of Article 100 of the *Satversme*.

It has been validly noted in the *Saeima*'s written reply that not every public expression of opinion is protected by the right to freedom of speech. The right to the freedom of speech does not protect certain public statements, moreover, not only in cases where they comprise calls to violence but also in cases where they do not comprise direct call to violence. Hence, *Dr. iur. Diāna Hamkova* upholds the *Saeima*'s opinion that the contested norm of the Criminal Law does not infringe upon the Applicant's rights, guaranteed in the first sentence of Article 100 of the *Satversme*.

However, if the Constitutional Court were to consider that such statements are protected by the first sentence of Article 100 of the *Satversme*, it should be taken into account that the right to the freedom of speech can be subject to certain restrictions. *Dr. iur. Diāna Hamkova* subscribes to the opinion of the *Saeima* and the Applicant that the restriction had been established by law and has legitimate aims, i.e., protection of the democratic state order and public security, and adds that also the protection of the national security and territorial unity could be considered as being its legitimate aims.

The crime envisaged in the contested norm of the Criminal Law is aimed at the basic interests of the State, enshrined in the *Satversme*. As to the objective side, the offence envisaged in this norm is characterised by invitation to destroy the independence of the Republic of Latvia as a state, by including Latvia in a single state formation with another state, or by invitation to destroy the national

independence of the Republic of Latvia in another manner. In accordance with the scope of the objective side of this criminal offence, the fact of violence is meaningless in the qualification of this offence. The legislator has considered that the basic national interests should be protected against both violent and non-violent actions.

The subjective side of the offence, envisaged in the contested norm of the Criminal Law, is characterised by the aim to destroy national independence, undermining the state's territorial unity. Allegedly, this offence is a crime that has formal constitutive elements. The fact that the offence has been committed by using violence raises the degree of its harmfulness; however, the absence of violence *per se* cannot justify actions that are incompatible with the *Satversme* and harmful to Latvia's national security.

National independence and security are said to be benefits under constitutional protection. It should be taken into account that only the most hazardous offences come into the focus of criminal law. Offences that are directed at the basic interests, enshrined in the *Satversme*, threaten the national independence, security and democratic order are said to belong to the most harmful threats and most dangerous for the public security, in broader meaning thereof. Hence, in the case of such threats, criminal liability is said to be the sole and the most appropriate measure.

Regulation, included in the contested norm of the Criminal Law, is aimed at protecting the independence of the Republic of Latvia as a state a constitutional value. The more important the object of the criminal offence, i.e., the interest protected by the Criminal Law, the more hazardous the respective criminal offence is. The threat to the interests of national security caused by the crime, envisaged in the contested norm of the Criminal Law, should be considered as being rather serious because, as stated in Section 1 (2) of the National Security Law, guaranteeing of national security is a basic obligation of the State.

**12. The summoned person –Mg. iur. Evija Vīnkalna, Lecturer at the Department of Criminal Law of the Faculty of Law, the University of Latvia** – holds that the contested transitional provision complies with Article 1 and the second sentence of Article 92 of the *Satversme*.

The contested norm of the Criminal Law envisages a crime with formal constituent elements and also the crime envisaged in Section 81 of the Criminal Law envisages a crime with formal (inchoate) constituent elements. However, the

purpose, included in the contested norm of the Criminal Law, is no longer highlighted in the disposition of Section 81 of the Criminal Law, and also the penalty set is more unfavourable to a person.

The criminal offence, included in the contested norm of the Criminal Law, substantially, has not been decriminalised by the Amendments of 21 April 2016. Likewise, it follows also from the annotation to the draft law “Amendments to the Criminal Law ” (No. 514/Lp12) that the contested norm of the Criminal Law now is included in other sections of the Criminal Law. The Supreme Court has noted this in its ruling.

*Mg. iur.* Evija Vīnkalna also subscribes to the statement made in the *Saeima*’s written reply that the fact that the words “in a manner not provided for in the *Satversme*” had been added to the disposition of Section 81 of the Criminal Law with respect to the criminal offence, committed by the Applicant, has no legal meaning because it is impossible to destroy the independence of the Republic of Latvia as a state in a manner provided for in the *Satversme*.

**13. The summoned person– *Dr. iur.* Andrejs Judins** – holds that the contested norm of the Criminal Law complies with the first sentence of Article 100 of the *Satversme* but the contested transitional provision is compatible with Article 1 and the second sentence of Article 92 of the *Satversme*.

The object of group of criminal offences, envisaged in Chapter X of the Criminal Law, is said to be national interests, the State’s sovereignty, territorial unity and security. The constituent elements of the crime, envisaged in the contested norm of the Criminal Law, had been defined for a legitimate aim – to protect the sovereignty of the Latvian people and the Latvian State, as well as to prevent actions directed at destroying the independence of the Republic of Latvia. Public invitation to destroy the independence of the Republic of Latvia as a state is action directed against the sovereignty of the Republic of Latvia, i.e., it jeopardises the right of the Latvian people to exercise its rights to self-determination without intervention by any external power and to decide on organisational matters of the State, and it also jeopardises the ability of institutions, established in the procedure set out in the *Satversme*, to realise the supreme rule on the territory of the Republic of Latvia. In constructing the contested norm of the Criminal Law, the legislator had envisaged that the criminal offence, defined therein, was to be recognised as being completed, irrespective of whether the

harmful consequences had set in, and that it could be committed only deliberately – with direct intent.

Compared to other actions directed at overthrowing the state power, for example, actions provided for in Section 80 of the Criminal Law, public invitation to destroy Latvia's national independence is less hazardous and, thus, has been recognised as a less serious crime, envisaging penalties appropriate for its hazardousness and nature. By envisaging criminal liability for such public invitation, the legislator has recognised as criminal such active and deliberate actions that have been committed to impact the consciousness of other persons and create in them the wish to commit such actions that are recognised as being criminal and may significantly harm protected interests.

*Dr. iur.* Andrejs Judins holds that the contested norm of the Criminal Law restricts a person's right to the freedom of speech; however, recognising public invitation to destroy the independence of the Republic of Latvia as a state as being a less serious crime had and still has a legitimate aim and the established restriction on rights should be considered as being proportional to the harm that could be caused if the aforementioned crime were committed.

Although the contested norm of the Criminal Law was deleted from the Criminal Law, there are no grounds to consider that the respective crime, i.e., public invitation to destroy the independence of the Republic of Latvia as a state with the aim of incorporating Latvia in single state formation with another state or to destroy it in another manner, had been decriminalised because this norm has been incorporated into Section 81 of the Criminal Law. Transferring the constituent elements of crime, which envisage liability for public invitation to destroy the independence of the Republic of Latvia as a state, to Section 81 of the Criminal Law should not be assessed as being favourable or unfavourable to a person – its meaning is said to be neutral. Hence, the contested transitional provision does not violate the rights and interests of a person, who is suspected or accused of committing the crime envisaged in the contested norm of the Criminal Law.

**14. The summoned person – *Dr. iur.* Māris Onževs – is of the opinion that, insofar, following adoption of the Amendments of 21 April 2016, the action, envisaged in the contested norm of the Criminal Law, continues to be criminally punishable in accordance with Section 81 of the Criminal Law or other provision**

of the Criminal Law by a penalty which is equally severe, the contested transitional provision does not violate Article 1 and Article 92 of the *Satversme*.

The German legal doctrine, *inter alia*, points to the possibility to derogate from the principle of establishing favourable retroactive effect in those cases when it is needed because of the construction of regulatory enactments, e.g. in cases where regulatory enactments adopted temporarily are replaced by other legal norms with the same content. In such cases when amendments have been made to restructure legal regulation, adoption of a legal norm does not automatically mean that the legislator should ensure, by favourable retroactive effect, protection of persons who had caused infringement upon rights during the term of validity of the previous legal regulation. Also in the present case, an important aspect related to the issue whether the obligation of applying the principle of favourable retroactive effect had been violated is linked to the inclusion of the legal content of the contested norm of the Criminal Law in the Criminal law after adoption of the Amendments of 21 April 2016. If the constituent elements of the contested norm of the Criminal Law have been included in Section 81 of the Criminal Law then it should not be considered that the principle of applying favourable retroactive force should be applied.

Application of the principle of favourable retroactive effect in criminal law cannot be examined in a narrowly formal way, every situation requires individual assessment of its content and nature. Decriminalisation of the previously punishable action or decrease of the penalty is the pre-condition for applying the principle of favourable retroactive effect. Therefore, if the State instead of decriminalising the criminally punishable action, introduces formal changes into the content of the norm, by including the provisions, set out in one section of the law, in another section of the same law, the principle of favourable retroactive effect cannot be considered as being violated. This understanding allows the legislator to maintain some flexibility and protects it from a situation where it could no longer introduce any structural changes into the Criminal Law.

**15. The summoned person – *Mg. iur.* Māris Burbergs** – holds that the contested norm of the Criminal Law is incompatible with the first sentence of Article 100 of the Criminal Law, insofar it envisages criminal liability in a case where the interests of the State and society are not genuinely jeopardised.

International instruments for the protection of human rights provide for the possibility of excluding certain statements from the protection of human rights.

However, the rulings of the European Court of Human Rights and the statements made by the United Nations (hereinafter – UN) Human Rights Committee, can be only partially applied to the invitation to incorporate a country into another country, insofar such invitation, as well as the denial of tragic historical facts and racist statements, incite hatred among various ethnic groups living in Latvia. Thus, for example, invitation to restore the Soviet Union and incorporate Latvia into it might be perceived as hate speech and cause tension in the relations between various ethnic groups of Latvia.

As regards statements on destroying statehood, Article 17 of the Convention had been applied in the judicature of the European Court of Human Rights if they had contained public invitation to start a domestic armed conflict to seize the state power, as well as to divide the territory of the state following the change of power. In difference to the Covenant and the Convention, Chapter VIII of the *Satversme* does not contain such regulation, pursuant to which such statements could remain outside the protection of the *Satversme* and the conditions for restricting fundamental rights should not be applied. Hence, *Mg. iur.* Māris Burbergs holds that, currently, international human rights law lacks united and consistent approach to excluding statements that contain hate speech from the scope of the freedom of speech. Therefore, these international elements should not be used to narrow the scope of the freedom of speech, protected by the *Satversme*. Likewise, international human rights law does not envisage excluding peaceful invitations to change the basic elements of the state from the scope of the freedom of speech.

The contested norm of the Criminal Law has been in force since the adoption of the Criminal Law, case law related to the application of this norm has evolved, and the Applicant himself has pointed out that the respective offence had been his response to information on the application of this norm to another person. Hence, the contested norm of the Criminal Law should be considered as being compatible with the degree of specificity required to consider that the restriction on the freedom of speech has been established by law.

The fact whether the *Satversme* provides for the possibility to incorporate Latvia into another state is said to be of no significance in the present case. The actual impossibility to implement certain invitation, defined in the *Satversme*, does not mean that the particular invitation cannot be expressed and that it cannot be debated or that such invitation is unlawful only because of the constitutional impossibility. In view of the fact that the unlawfulness of the respective invitation

has been defined in the Criminal Law, there is no need to broaden the matter to be dealt with in the present case and review the constitutionality of invitation to incorporate Latvia into another state.

The contested norm of the Criminal Law prohibits invitation to incorporate Latvia into the Russian Federation, as well as to the United States of America, i.e., neither the level of democracy of the state, to which the person making the invitation would want to see Latvia annexed, nor the genuine threat that the respective state causes to the interests of the Latvian State and society matter in its application. Likewise, the contested norm of the Criminal Law does not differentiate between invitations to peaceful or to violent incorporation, the legal nature of the incorporation is also irrelevant. The United States of America is Latvia's strategic partner in the area of security and does not threaten the existence of the State of Latvia and its democratic order. Thus, public invitation to incorporate Latvia into the United States of America cannot increase the possibility that the United States of America would engage in aggressive acts to implement such invitation. Such invitation does not jeopardise public security and does not cause tension in the Latvian society.

Discussions about the future of Europe, during which invitation to establish the United States of Europe is often heard, does not cause such threats either. However, pursuant to the contested norm of the Criminal Law, such discussions are restricted and those supporting the idea of a federal state may not express public invitation to create a new federal state, in which Latvia would be included as one of the federal states, irrespective of the fact that the democratic state order would be retained and Latvia would not entirely lose its sovereignty with respect to certain matters. Hence, *Mg. iur.* Māris Burbergs is of the opinion that the restriction on fundamental rights, set out in the contested norm of the Criminal Law, is broad and complete, moreover, it prohibits more than is necessary for reaching the legitimate aims – protection of public security and democratic state order.

**16. The summoned person –*Dr. iur.* Jānis Pleps, Docent at and Head of the Department of the Theory and History of Law at the Faculty of Law, the University of Latvia** – holds that the inclusion of the reference “in manner not provided for in the *Satversme*” in Sections 80, 80<sup>1</sup> and 81 of the Criminal Law does not automatically mean that it would be possible to carry out all actions, envisaged in these sections, also in a manner provided for in the *Satversme* and then they

would not be criminally punishable. In each particular case, it should be clarified through proper interpretation of the respective provision of the *Satversme* and by filling the respective feature of the legal constituent elements with specific content.

The feature of these constituent elements is the reference that the respective legal matter has not been substantially regulated by a norm of the Criminal Law but needs to be elucidated through interpreting and applying the *Satversme*. The legislator may not even decide substantially by a legal act of lower legal force a matter that needs to be resolved on the constitutional level. Only the *Satversme* itself can define, which actions would be constitutionally admissible and which would be anti-constitutional. Hence, the existence of the reference “in A manner not provided for in the *Satversme*” in valid Section 81 of the Criminal Law may not automatically lead to the conclusion that this wording is More favourable to the Applicant than the contested norm of the Criminal Law. To determine this, it should be clarified whether the *Satversme* allows turning constitutionally against the independence and sovereignty of the Republic of Latvia as a state. This means that an answer to a constitutional law matter of principal importance should be found in the present case, i.e., whether the *Satversme* allows for a constitutional way for destroying the national independence of the Republic of Latvia.

Within the system of the *Satversme*, the prohibition to destroy Latvia as an independent democratic republic may exist as a written constitutional-level provision, as an unwritten general legal principle of Latvia – a democratic state governed by the rule of law, as well as generally binding interpretation of a constitutional-level provision, provided by the Constitutional Court. Considering the Constitutional Court’s case law, the Constitutional Court’s finding that the State of Latvia is founded on such basic values that include, *inter alia*, democracy, sovereignty of the State and the people, and that these values may not be infringed upon by amendments to the *Satversme*, which had been introduced only by law, requires careful consideration. Further conclusion may be derived from this finding by the Constitutional Court, i.e., that the constitutional legislator (either the *Saeima*, or the totality of Latvia’s citizens) could not revise the existence of Latvia as an independent democratic republic by amendments to the *Satversme*. Likewise, the statements made in the Introduction to the *Satversme* regarding the unwavering will of the Latvian nation to have its own State and the obligation to ensure the existence of the State of Latvia throughout centuries should be taken into account. The respective constitutional-level provisions could be deemed to be

such that constitutionally exclude the possibility of destroying Latvia as an independent democratic state.

Constitutional prohibition to destroy Latvia as an independent democratic republic already had been developed as an unwritten general legal principle of Latvia, a democratic state governed by the rule of law, and had been accepted both in the science and doctrine of law. In view of these facts, it can be established that constitutional prohibition to destroy Latvia as an independent democratic republic exists. Hence, it is impossible to turn against the national independence and sovereignty of the Republic of Latvia, i.e., to destroy the independence of the Republic of Latvia as a state, in a manner provided for in the *Satversme*.

*Dr. iur.* Jānis Pleps holds that the reasoning, provided in the Applicant's constitutional complaint, does not point to manifest infringements of the legislator's discretion in the area of penal policy. The *Saeima* has substantiated compliance of the contested norm of the Criminal Law with the first sentence of Article 100 of the *Satversme*. Upon establishing that a constitutional-level norm that prohibits destroying Latvia as an independent democratic republic exists, it could be possible to consider in the present case whether it should not be considered as being direct restriction on fundamental rights, defined in the constitution. I.e., public invitations to destroy the independence of the Republic of Latvia as a state are beyond the limits of the freedom of speech, included in the first sentence of Article 100 of the *Satversme*, and such narrowing has been established by another constitutional-level norm, which should be taken into account when applying the first sentence of Article 100 of the *Satversme*.

### **The Constitutional Court found:**

**17.** The Applicant requests reviewing compatibility of the contested norm of the Criminal Law with the first sentence of Article 100 of the *Satversme*, which envisages a person's right to the freedom of speech.

The freedom of speech is considered to be one of the most important fundamental human rights and is included in the basic law of all democratic states (*see Judgement by the Constitutional Court of 2 July 2015 in Case No. 2015-01-01, Para 11.1.*).

The right to the freedom of speech, defined in Article 100 of the *Satversme*, is a right that protects ta person. Namely, it envisages, *inter alia*, that an individual may ask the State not to interfere into the area of their freedom of speech. The

freedom of speech is a value of a democratic state and an essential element of democratic society, which ensures the society's possibility to impact political processes, *inter alia*, by criticising the state power. However, the exercise of this right is linked to special obligations and responsibility because the right to freedom of speech does not mean impunity. Understanding of the values of a democratic state should be promoted not by measures that cause fear from punishment but by measures that facilitate plurality of opinion.

Two aspects of the freedom of speech should be differentiated between: the positive one (individuals' right to freely obtain and disseminate information, express their opinions) and the negative one (the right to retain information, adhere to one's views and to not express them). The positive aspect of the freedom of speech comprises the right to express one's opinion in any manner – orally, in writing, visually, by using artistic means of expression, etc. (*see Judgement by the Constitutional Court of 2 July 2015 in Case No. 2015-01-01, Para 11.3., and Judgement of 21 December 2017 in Case No. 2017-03-01, Para 13*)

In clarifying the content of fundamental rights, defined in the *Satversme*, Latvia's international commitments in the area of human rights must be taken into account. Article 89 of the *Satversme* provides that the State recognises and protects fundamental human rights in accordance with the *Satversme*, laws and international agreements binding upon Latvia. It follows from this article that the legislator's aim is to achieve harmony between the fundamental rights, included in the *Satversme*, and the international human rights provisions (*see Judgement by the Constitutional Court of 11 December 2020 in Case No. 2020-26-0106, Para 11.1.*).

The Constitutional Court has recognised that the content of Article 100 of the *Satversme* should be revealed more comprehensively by complying with Article 10 of the Convention, as well as Article 19 of the Covenant (*see Judgement by the Constitutional Court of 5 June 2003 in Case No. 2003-02-0106, Para 1 of the Findings, and Judgement of 2 July 2015 in Case No. 2015-01-01, Para 11.3.*).

Para 1 of Article 10 of the Convention provides, *inter alia*, that everyone has the right to freely express their opinions. This right comprises freedom of opinion and the right to receive and disseminate freely information and ideas without interference by public institutions and irrespectively of national borders. However, the right to freedom of speech is not absolute (*see, for example, Judgement by the Constitutional Court of 29 October 2003 in Case*

*No. 2003-05-01, Para 21–22, and Judgement of 21 December 2017 in Case No. 2017-03-01, Para 14).*

The European Court of Human Rights has recognised that the freedom of expression is one of the essential foundations of a democratic society and one of the basic pre-conditions for its development and self-realisation of each individual (*see, for example, Judgement by the Grand Chamber of the European Court of Human Rights of 10 December 2007 in Case “Stoll v. Switzerland”, Application No. 69698/01, Para 101*). The freedom of expression pertains not only to such information or ideas which are perceived positively or are considered to be inoffensive or leave others indifferent but also to such information or ideas that offend, shock or upset others. Such are the terms of pluralism, tolerance and openness, without which democratic society is inconceivable (*see, for example, Judgement by the Grand Chamber of the European Court of Human Rights of 29 March 2016 in Case “Bédat v. Switzerland”, Application No. 56925/08, Para 48, and Judgement of 15 February 2005 in Case “Steel and Morris v. the United Kingdom”, Application No. 68416/01, Para 87*).

The essence of democracy is its ability to solve problems in open debates. Democracy develops thanks to the freedom of expression (*compare, see, for example, Judgement by the Grand Chamber of the European Court of Human Rights of 30 January 1998 in Case “United Communist Party of Turkey and Others v. Turkey”, Application No. 19392/92, Para 57*). In a democratic society, based on the rule of law, persons who are expressing political ideas that are implemented by peaceful means should be granted proper possibility to express themselves (*compare, see, for example, Judgement by the European Court of Human Rights of 2 October 2011 in Case “Stankov and the United Macedonian Organisation Ilinden v. Bulgaria”, Applications No. 29221/95 and No. 29225/95, Para 97*). In assessing expressions, the words used and the context, in which they have been expressed, as well as their possible impact should be taken into account (*compare, see, for example, Judgement by the European Court of Human Rights of 16 March 2000 in Case “Özgür Gündem v. Turkey”, Application No. 23144/93, Para 63*).

In its written reply, the *Saeima* refers to the prohibition to abuse rights, included in Article 17 of the Convention. Namely, if Article 17 of the Convention is applied in relation to Article 10 of the Convention, then the respective expressions, allegedly, do not fall within the scope of Article 10 of the Convention.

The European Court of Human Rights has recognised that the aim of Article 17 of the Convention is to deny to persons and groups of persons the possibility to participate in such actions, as well as justify or take such actions that are aimed at destroying the rights and freedoms, enshrined in the Convention. However, this Article is applicable only on an exceptional basis and in extreme cases (*see, for example, Judgement by the Grand Chamber of the European Court of Human Rights of 6 January 2011 in Case “Paksas v. Lithuania”, Application No. 34932/04, Para 87*). Several of the summoned persons also refer to this (*see, Opinion of Kristīne Līce, Cabinet’s Representative to International Human Rights Organisations, Case Materials, Vol. 3, pp. 61–66, and Opinion of the Latvian Council of Sworn Advocates in Case Materials, Vol. 3, pp. 35–40*). In cases that pertain to Article 10 of the Convention, Article 17 of the Convention should be applicable only if it is immediately clear that the freedom of speech is exercised for purposes that are manifestly contrary to the Convention’s values (*compare, see, for example, Judgement by the Grand Chamber of the European Court of Human Rights of 15 October 2015 in Case “Perinçek v. Switzerland”, Application No. 27510/08, Para 114*).

With respect to invitations linked to destruction of the national independence, the European Court of Human Rights has applied Article 17 of the Convention, in assessing invitation to domestic armed conflict with the purpose of seizing the state power and dividing the territory of the state, and has recognised that the disseminated messages jeopardised public security and democracy and were contrary to values, on which the Convention and democratic societies were based, *inter alia*, justice, free elections, and peace (*see Judgement by the European Court of Human Rights of 16 July 2020 in Case “Romanov v. Ukraine”, Application No. 63782/11, Para 163–166*).

Hence, international human rights provisions do not exclude from the scope of the freedom of speech peaceful invitations to change the fundamental elements of a state. A similar opinion was expressed also by *Mg. iur.* Māris Burbergs (*see Mg. iur. Māris Burberg’s Opinion in Case Materials, Vol. 4, pp. 72–75*).

Article 19 of the Covenant provides, *inter alia*, that everyone has the right to hold opinions without interference and to express them freely. However, exercise of this right is linked to special obligations and responsibility. It has been noted in legal doctrine that the freedom of opinions and the freedom to express them has been often foregrounded as the core of the Covenant and a yardstick for other rights, enshrined in the Covenant. This freedoms unites civil and political

rights in a harmonious whole (*compare, see: Nowak M. U. N. Covenant on Civil and Political Rights: CCPR Commentary. Kehl am Rhein: Engel, 1993, p. 336*).

However, expression of ideas should be separated from activities that go beyond that what is related to active implementation of these ideas. For example, specific preliminary work for overthrowing the government are criminal activities, to which the protection of the freedom of speech does not apply, irrespective of the admissibility of interference in accordance with Para 3 of Article 19 of the Covenant. However, member states may not expand the protection of national security to the extent to suppress simple expression of opinions or to punish for it, even if such opinions are very critical (*compare, see: Nowak M. U. N. Covenant on Civil and Political Rights: CCPR Commentary. Kehl am Rhein: Engel, 1993, pp. 341–342*).

The Commission of the Council of Europe “Democracy through Law” (Venice Commission) has expressed also the opinion that a democratic state should not be afraid of debates on even the most shocking and anti-democratic ideas. These ideas should be countered and the supremacy of democratic values should be demonstrated in open debate. Persuasion through open public debate, as opposed to ban or repression, is the most democratic means for protecting fundamental values (*see Report by the European Commission for Democracy through Law (Venice Commission) of 23 October 2008 CDL-AD(2008)026, Para 44, available: <http://www.venice.coe.int>*).

**Hence, the first sentence of Article 100 of the *Satversme* comprises the right to express opinions, also such opinions that challenge the existing order of the State and are implemented by peaceful means.**

**18.** The participants in the case and the summoned persons expressed different opinions on the scope of the contested norm of the Criminal Law and its application. To determine whether there are grounds for reviewing the compatibility of the contested norm of the Criminal Law with the *Satversme*, the Constitutional Court must, first and foremost, elucidate the purpose of this norm and its genuine meaning.

**18.1.** The legislator, by the contested norm of the Criminal Law, has recognised as being criminally punishable certain public invitation by a person – to destroy the independence of the Republic of Latvia as a state. It follows from the way the text of the contested norm of the Criminal Law has been worded that criminal liability has been envisaged for one of the following actions: 1) invitation

to destroy the independence of the Republic of Latvia as a state with the aim of including Latvia into single state formation with another state; 2) invitation to destroy the national independence of the Republic of Latvia in another manner.

The word “invitation” means “completed action → to invite; request, encouragement to arrive, to participate” (see: *Latviešu valodas vārdnīca. 30 000 pamatvārdu un to skaidrojumu. 2. izdevums. Rīga: „Izdevniecība Avots”, 2013, 21. lpp.*). Whereas the word “destroy” means “to achieve that something ceases to exist, function; to achieve that something disappears; to annihilate, to kill” (see: *Svešvārdu vārdnīca. 25 000 vārdu un terminu. Rīga: „Izdevniecība Avots”, 2008, 488. lpp.*), “to terminate, interrupt (someone’s) functioning, existence, to annihilate” (see: *Latviešu valodas vārdnīca. 30 000 pamatvārdu un to skaidrojumu. 2. izdevums. Rīga: „Izdevniecība Avots”, 2013, 600. lpp.*).

With respect to the feature, included in the contested norm of the Criminal Law, i.e., the public nature of invitation, it has been recognised in legal doctrine that invitation should be considered as being public if it has been expressed in the presence of other persons or in a manner that allows also an absent person to familiarise themselves with it (see: *Krastiņš U., Liholaja V., Niedre A. Krimināltiesības. Sevišķā daļa. Trešais papildinātais izdevums. Rīga: Tiesu namu aģentūra, 2009, 40. lpp.*).

The text of the contested norm of the Criminal Law proves, *inter alia*, that, in order to make a person criminally liable, certain action must be established – public expression of the invitation. Hence, pursuant to the textual wording of the contested norm of the Criminal Law, it prohibits all kinds of public invitations to destroy the independence of the Republic of Latvia as a state. In explaining the action, for which the contested norm of the Criminal Law envisages criminal liability, the opinion has been expressed in legal doctrine that the particular criminal offence is considered to be completed by the public expression of the invitation (see: *Krastiņš U., Liholaja V., Niedre A. Krimināltiesības. Sevišķā daļa. Trešais papildinātais izdevums. Rīga: Tiesu namu aģentūra, 2009, 40.–41. lpp.*).

To elucidate the substantive scope of legal norms, *inter alia*, the substantive scope of criminal law provisions, also other methods for interpreting legal norms must be used.

**18.2.** The democratic order of Latvia was restored after occupation, perpetrated by a non-democratic (totalitarian) regime. Following the restoration of Latvia’s independence, the legal system in the State was transformed to law that

was compatible with a democratic state governed by the rule of law, the basic value of which is ensuring human rights.

While Latvia was restoring and consolidating its national independence and democratic state order, with the aim of protecting it, the legislator of the time had included already in the Latvian Criminal Code a norm that envisaged criminal liability “for public invitations to destroy the independence of the Republic of Latvia as a state, by including Latvia in a single state formation with any other state or a union of states, or in any other manner”. Later, similar regulation was adopted in the Criminal Law. Thus, such regulation has existed within the Latvian legal system for a long time.

Criminal liability for public invitation to destroy the independence of the Republic of Latvia as a state was envisaged in Section 82 of the Criminal Law until 10 May 2016 because, by the Amendments of 21 April 2016, the contested norm of the Criminal Law was deleted from it, whereas Sections 80, 80<sup>1</sup> and 81 of the Criminal Law were expressed in new wording. Section 81 the Criminal Law, in its currently valid wording, envisages criminal liability for public invitation to turn against the national independence of the Republic of Latvia, its sovereignty, territorial unity, state power or state order in a manner not provided for in the *Satversme* of the Republic of Latvia or for disseminating materials containing such content.

It follows from the materials related to drafting and adoption of the Amendments of 21 April 2016 that these amendments were used to introduce structural changes to Chapter X of the Criminal Law, *inter alia*, by including from then on the contested norm of the Criminal Law in Section 81 of the Criminal Law (*see, for example, Annotation to Draft Law of 21 April 2016 “Amendments to Criminal Law” (Draft Law No. 514/Lp12), Section I, Para 2 and Minutes of the Saeima Legal Committee in Case Materials, Vol. 2, pp. 20–55*). Several of the summoned persons have expressed a similar opinion, i.e., that as the result of the Amendments of 21 April 2016 the contested norm of the Criminal Law was included in Section 81 of the Criminal Law (*see, for example, Dr. habil. iur. Uldis Krastiņš’ Opinion in Case Materials, Vol. 3, pp. 41–44, Evija Vīnkalna’s Opinion in Case Materials, Vol. 4, pp. 66–71, and Dr. iur. Andrejs Judins’ Opinion in Case Materials, Vol. 3, pp. 56–60*).

In examining proposals for the second reading, members of the *Saeima* Legal Committee expressed their opinions also about the scope of Section 81 of the Criminal Law.

Several deputies pointed out that this norm of the Criminal Law should be interpreted narrowly and that special attention should be paid to educating those who apply legal norms (*see, Case Materials, Vol. 2, pp. 45–55*).

At the Committee's sitting, the representative of the Ministry of Justice noted that the freedom of speech, similarly to other rights and freedoms referred to in the *Satversme*, can be restricted in certain procedure and that this procedure had been included in the words "in a manner not provided for in the *Satversme*" (*see Case Materials, Vol. 2, p. 46*).

At the Committee's sitting, the Cabinet's Representative to International Human Rights Organisations drew the deputies' attention to the fact that the text of this norm did not yet guarantee that situations would not occur in practice when disproportional application of this norm could constitute a violation of the freedom of speech or the freedom of assembly; hence, education of parties applying legal norms should be focused on, so that they would be able to identify the situations where this norm causes restrictions also on the freedom of speech, and hence, the proportionality of this restriction needs to be assessed (*see Case Materials, Vol. 2, p. 46*).

The representative of the Security Police stated at the Committee's sitting that application of the Criminal Law was the extreme measure and that experts of constitutional law were involved in the investigation of respective cases, if necessary, also in relation to issues pertaining to human rights. These issues are being assessed and, in the absence of positive opinions by the experts, criminal proceedings are not proceeded with (*see Case Materials, Vol. 2, pp. 47–48*).

The Parliamentary Secretary of the Ministry of the Interior noted that a person would be made criminally liable only if all other measures had been exhausted and it would be clear that a person's intention is not benevolent for the Republic of Latvia, its independence, constitutional form, moreover, each case should be assessed individually (*see Case Materials, Vol. 2, pp. 48–49*).

Hence, it follows from the materials related to drafting and adoption of the Amendments of 21 April 2016, submitted by the *Saeima*, that the legislator's purpose had been to include from then on the contested norm in Section 81 of the Criminal Law, that discussions on the textual wording and the scope of this norm had taken place and that, in this discussion, the legislator had been aware of the significance of the freedom of speech as a fundamental human right.

**18.3.** In adopting legal norms, the principle of unity of the legal system and the principle of a rational legislator also should be taken into account. Namely, the

legislator adopts aligned legal norms, which operate harmoniously within the framework of the entire legal system (*compare, see, for example, Judgement by the Constitutional Court of 8 March 2017 in Case No. 2016-07-01, Para 25.2.*). No legal norm can be understood outside the legal system, in which it functions.

One of the instruments that a State uses to protect its national independence and democratic state order is also criminal liability, set out in legal norms, for criminal offences against the State. Within the Latvian legal system, criminal liability for such criminal offences is envisaged in Chapter X of the Criminal Law, which include also the contested norm of the Criminal Law. It has been recognised in legal doctrine that the criminal offences against the State, included in the Criminal Law, are such harmful and unlawful offences that jeopardise security and independence of the State of Latvia, as well as its political and economic security (*compare, see: Krastiņš U., Liholaja V., Niedre A. Krimināltiesības. Sevišķā daļa. Trešais papildinātais izdevums. Rīga: Tiesu namu aģentūra, 2009, 35. lpp.*). Thus, the legislator has recognised that the offence, envisaged in the contested norm of the Criminal Law, jeopardises the State of Latvia and has such degree of the severity of the possible harm caused by it that there are grounds for recognising this offence as being criminally punishable. Namely, the legislator has considered that expression of invitation, envisaged in the contested norm of the Criminal Law, endangers the independence of the Republic of Latvia as a state.

The contested norm of the Criminal Law, on the one hand, serves for the protection of the state, and, on the other hand, affect also one of the most important manifestations of democratic society, i.e., the right to freedom of speech. In its judicature, the Constitutional Court has underscored the importance of the freedom of speech in a democratic state governed by the rule of law, noting that the right to freedom of speech characterises a democratic state order, whereas the scope of this right – democratic society (*see, for example, Judgement by the Constitutional Court of 29 October 2003 in Case No. 2003-05-01, Para 31.3.* ). As noted above, the right to the freedom of speech, established in Article 100 of the *Satversme*, is a right that protects a person and, *inter alia*, envisages that an individual may request the State to not interfere into the area of their freedom of speech.

The legislator must, *inter alia*, in the area of criminal law, create such a system of legal regulation that would function harmoniously within the framework of the entire legal system and would not be in conflict with a person's fundamental rights, included in the *Satversme*. Hence, in accordance with the principle of a rational legislator, also in adopting the contested norm of the Criminal Law, the

legislator's purpose was not to oppose it to the fundamental rights, included in the *Satversme*, and, thus, the contested norm of the Criminal Law should be interpreted within the interconnected legal system in conjunction with a person's fundamental rights, included in the *Satversme*, i.e., the right to freedom of speech.

On the level of constitutional law, the international human rights provisions, binding upon Latvia, and the practice of their application serve as means of specifying to determine the content and scope of fundamental rights and other general legal principles, insofar this does not lead to decreasing the protection of fundamental rights, included in the *Satversme* (see *Judgement by the Constitutional Court of 2 December 2021 in Case No. 2021-07-01, Para 16.2.*). Fundamental rights, included in international treaties on human rights and in the *Satversme*, create a united whole within the Latvian legal system.

Hence, in interpreting criminal law provisions, a solution should be sought that would ensure harmony between the norms of the *Satversme* and the Convention. Thus, the contested norm of the Criminal Law should be examined in a systemic way and in conjunction with Article 10 of the Convention, which defines a person's right to freedom of speech.

In its judicature, the European Court of Human Rights has underscored, in particular, that restrictions on the freedom of expression should be measures of exceptional nature and that the need for them should be convincingly substantiated (see, for example, *Judgement by the Grand Chamber of the European Court of Human Rights of 7 December 1976 in Case "Handyside v. The United Kingdom", Application No. 5493/72, Para 49*).

Restrictions on the freedom of speech may be imposed only in cases where the freedom of speech cause clear and direct threats to society (compare, see also *Judgement by the Constitutional Court of 5 June 2003 in Case No. 2003-02-0106, Para 1 of the Findings*). The Cabinet's Representative to International Human Rights Organisations also has expressed the opinion that the European Court of Human Rights has underscored in its judicature: the states that refer to protection of the national or public security as the legitimate aim of a restriction may not refer to abstract threats – only concrete and genuinely endangered interests are to be protected (see *Opinion of Kristīne Līce, the Cabinet's Representative to International Human Rights Organisations, in Case Materials, Vol. 3, pp. 61–66*).

The European Court of Human Rights, in specifying the right to freedom of speech, included in Article 10 of the Convention, has pointed out various aspects of assessment. In assessing each particular case, both the social and political

background, as well as the direct and more extensive context of the statements expressed by a person may be important, as well as whether the expressions of a person can be considered as direct or indirect call for violence or justification of violence, hate or intolerance (*see, for example, Judgement by the European Court of Human Rights of 11 May 2021 in Case “Kilin v. Russia”, Application No. 10271/12, Para 71*). The European Court of Human Rights pays special attention also to whether the statements pertain to an issue important for society. It also assesses the content of a statement, for example, whether the statements have been expressed in good faith (*see, for example, Judgement by the Grand Chamber of the European Court of Human Rights of 29 March 2016 in Case “Bédat v. Switzerland”, Application No. 56925/08, Paras 49–50, 58, and 63*).

Systemically, the contested norm of the Criminal Law is compatible with a person’s fundamental rights, included in the *Satversme* and the Convention, and, thus, *per se*, does not cause a collision with a person’s fundamental rights, i.e., the right to freedom of speech. The contested norm of the Criminal Law cannot be interpreted broadly, without taking into consideration the system of legal regulation, within which it functions. In view of the first sentence of Article 100 of the *Satversme* and Article 10 of the Convention, a conclusion that the contested norm of the Criminal Law envisages recognising all types of public invitations to destroy national independence as being criminally punishable would be contrary to the systemic interpretation of the contested norm of the Criminal Law. Namely, it is not enough to establish the fact of expressing public invitation to make a person criminally liable for the criminal offence envisaged in the contested norm of the Criminal Law if the particular situation and the person’s statements are not examined on their merits.

Systemic interpretation of the contested norm of the Criminal Law in conjunction with a person’s right to freedom of speech allows concluding that this norm envisages criminal liability only for such public invitation to destroy the independence of the Republic of Latvia as a state, which causes genuine threat to national and public interests and incites to such actions that would actually allow reaching the aim of the invitation.

**18.4.** The defensive function should be recognised as one of the main directions for the effect of criminal law, which is manifested as the protection of certain interests of the State, society, certain groups of people and individuals against criminal offences (*compare, see: Krastiņš U., Liholaja V., Niedre A. Krimināltiesības. Vispārīgā daļa. Trešais papildinātais izdevums. Rīga: Tiesu*

*namu aģentūra, 2008, 18. lpp.*). Whereas a criminal offence is a certain act of a person's conduct, their active, unlawful acts (action ) or passive unlawful conduct (failure to act), by which harm is inflicted or could have been inflicted upon the interests of the State, society, groups of persons or individuals that are protected by the Criminal Law (*compare, see: Krastiņš U., Liholaja V. Krimināllikuma komentāri. Pirmā daļa (I–VIII<sup>2</sup> nodaļa). Otrais papildinātais izdevums. Rīga: Tiesu namu aģentūra, 2018, 14. lpp.*). Hence, any norm that provides for criminal liability is directed at protecting some particular interests.

The Constitutional Court has recognised: the State of Latvia is founded on such basic values that include, *inter alia*, fundamental rights and freedoms, democracy, sovereignty of the state and the people, separations of powers, and the rule of law (*see, Judgement by the Constitutional Court of 7 April 2009 in Case No. 2008-35-01, Para 17*). The constitutional law foundations of the State of Latvia are reflected, *inter alia*, the acts established in the State of Latvia. By proclaiming that “Latvia – united within the ethnographic borders (Kurzeme, Vidzeme, and Latgale) – self-dependent, independent, democratic republican state” in the Act of Proclamation, the People's Council of Latvia reflected the constitutional law basis of the State of Latvia. Whereas the Constitutional Assembly, elected by the people of Latvia, in adopting the Declaration on the State of Latvia, in the name of the Latvian people, accepted the work done by the previous institution in creating the State of Latvia (*compare, see Judgement by the Constitutional Court of 29 November 2007 in Case No. 2007-10-0102, Para 17*).

The first paragraph in the Introduction to the *Satversme* provides that “the State of Latvia has been established [...] in order to guarantee the existence and development of the Latvian nation, its language and culture throughout the centuries, to ensure freedom and promote welfare of the people of Latvia and each individual”. The Constitutional Court has recognised that the Latvian nation should defend its sovereignty, the national independence, territory of Latvia, its unity and democratic state order. A person's rights cannot be exercised to turn against national independence and the principles of a democratic state governed by the rule of law (*see Judgement by the Constitutional Court of 29 June 2018 in Case No. 2017-25-01, Para 20.2.*).

The contested norm of the Criminal Law serves to defend the State and its democracy. This norms facilitates implementation of the principle of militant democracy. The Constitutional Court has underscored previously that exercise of human rights may not be directed against democracy as such (*compare, see, for*

*example, Judgement by the Constitutional Court of 30 August 2000 in Case No. 2000-03-01, Para 6 of the Findings*). The European Court of Human Rights also has recognised that the State, in order to guarantee the stability and effectiveness of its democratic system, might need to take special self-defensive measures. Democracy is based on compromise, which requires from individuals various concessions, and, sometimes, they must be ready to restrict some of their freedoms to ensure greater stability of the entire State (*see Judgement by the Grand Chamber of the European Court of Human Rights of 16 March 2006 in Case “Ždanoka v. Latvia”, Application No. 58278/00, Para 100*).

The contested norm of the Criminal Law protects the independence of the Republic of Latvia as a state and its democratic state order; however, also protection of human rights, *inter alia*, the right to freedom of speech is one of the most important guarantees of a democratic state governed by the rule of law. Thus, the aim of the contested norm of the Criminal Law should be examined in interconnection with other fundamental rights of a person, included in the *Satversme*.

By envisaging criminal liability for publicly expressed invitations to destroy independence of the Republic of Latvia as a state, persons are deterred from expressing such statements, being aware of the threat of a criminal penalty, which facilitates also protection of public security. However, depending on the actual features of each specific offence, public invitations to destroy the national independence may have different impact on the threat caused to the national and public interests and not all public invitations of the kind cause genuine threats to national independence.

The objective aim of the contested norm of the Criminal Law is to turn against persons who express such public invitations to destroy national independence that exceed the limits of the freedom of speech and cause genuine threats to national independence and democratic state order of the Republic of Latvia. The outcome of this interpretation coincides also with the one, to which the Constitutional Court already arrived at in Para 18.3. of this decision.

**Thus, the contested norm of the Criminal Law, pursuant to its aim and genuine meaning, provides for criminal liability only for such public invitation to destroy the independence of the Republic of Latvia as a state that causes genuine threats to national and public interests and incites to actions that would actually allow reaching the aim of the invitation.**

19. Application of a legal norm in compliance with the *Satversme* always includes interpretation of this norm. In the particular case, methods for interpreting legal norms, the systemic and teleological, in particular, allow elucidating the scope of the contested norm of the Criminal Law. The interpretation of the contested norm of the Criminal Law, provided in Para 18 of this decision, ensures protection of a person's fundamental rights, included in the first sentence of Article 100 of the *Satversme*. Thus, interpretation and application of the contested norm of the Criminal Law in compliance with the *Satversme*, simultaneously eliminate the grounds for challenging its constitutionality. Whether the invitation causes genuine threats to national and public interests and incites to action that would allow actually reaching the aim of the invitation, in turn, must be assessed in compliance with the evidence obtained in criminal proceedings and in accordance with the actual features of the particular criminal offence, examining the expressed invitation both on its merits and in relation to the actual features of the particular offence, for example, context of the invitation, stability and level of development of the democratic state order, as well as the threat to the national and public security existing at the particular time.

Thus, the Applicant's assumption that the contested norm of the Criminal Law causes collision of legal norms with superior legal norms is not valid. Whereas assessment of the actual facts of the criminal case and qualification of the offence, committed by the person, do not fall within the Constitutional Court's jurisdiction. Hence, there are no grounds for the Constitutional Court to continue legal proceedings in this part of the case.

**Hence, on the basis of Para 6 of Section 29 (1) of the Constitutional Court Law, legal proceedings in the case regarding the compliance of the contested norm of the Criminal Law with the first sentence of Article 100 of the *Satversme* shall be terminated.**

20. The Applicant request reviewing also compliance of the contested transitional provision with Article 1 and the second sentence of Article 92 of the *Satversme*. The contested transitional provision pertains not only to amendments to the contested norm of the Criminal Law but also to amendments to other sections of Special Part of the Criminal Law. Within the framework of the present case, the Constitutional Court will examine compliance of the contested transitional provision with Article 1 and the second sentence of Article 92 of the *Satversme*, insofar it pertains to the contested norm of the Criminal Law.

**21.** The Constitutional Court has recognised that, in difference to the abstract constitutional review, a constitutional complaint is not a measure that would serve only for aligning the legal system. First and foremost, it is a measure that serves to protect the fundamental rights of the person submitting the constitutional complaint (*see Decision by the Constitutional Complaint of 10 December 2021 on Terminating Legal Proceedings in Case No. 2021-11-01, Para 11.1*).

To review a case, initiated on the basis of a constitutional complaint, the Constitutional Court must establish an infringement on a person's fundamental rights (*see Judgement by the Constitutional Court of 2 March 2016 in Case No. 2015-11-03, Para 16*). This matter already has been assessed by the Panel, deciding on initiation of the case, because, pursuant to Section 20 (5) of the Constitutional Court Law, a Panel, in examining an application, has the right to refuse initiation of the case if it is incompatible with the requirements set in Section 18 or Sections 19–19<sup>3</sup> of this law. However, in this assessment, the Panel's actions are limited by the materials at its disposal. The Constitutional Court, in reviewing the case, reassesses the infringement on the person's rights, taking into account the materials collected during the stage of preparing the case (*see Judgement by the Constitutional Court of 25 September 2020 in Case No. 2019-35-01, Para 11*).

**21.1.** The Applicant holds that the legislator, by the Amendments of 21 April 2016, had recognised public invitation to turn against the independence of the Republic of Latvia as a state in a manner provided for in the *Satversme* as not being criminally punishable. To his mind, there is no objective justification for the fact that the contested transitional provision with respect to the deletion of the contested norm from the Criminal Law does not envisage the principle of retroactive effect of a more favourable provision in criminal law. This principle, allegedly, requires eliminating, as soon as possible, the incompatibility with the *Satversme* and application of the new regulation. Hence, the Applicant holds that the contested transitional provision is incompatible with the Article 1 and the second sentence of Article 92 of the *Satversme*.

The Constitutional Court already has recognised that Article 1 and the second sentence of Article 92 of the *Satversme*, in conjunction, comprise the principle of retroactive effect of a rule more favourable to a person in criminal law, which is applicable also in the case where the particular offence has been

recognised as not being criminally punishable (*see Judgement by the Constitutional Court of 19 February 2021 in Case No. 2020-23-01, Para 21.5.*).

The principle of the retroactive effect of a provision more favourable to a person in criminal law is derived from the principle of the rule of law because it also entails that such punishment as the legislator deems to be appropriate at the time of defining the punishment should be applied to each punishable activity. Thus, the principle of retroactive effect of a rule that is more favourable to a person in criminal law provides: if the law that was in force at the time when the criminal offence was committed, which provided for criminal liability, differs from the one that has been adopted after the criminal offence was committed, the law, the provisions of which are more favourable to the accused, should be applied.

Such cases are possible when, taking into account the specific actual and legal circumstances, derogation from the principle of retroactive effect of a provision more favourable to a person in criminal law is possible. However, criminal penalty cannot be applied to a person for the sole reason that it was provided for in the Criminal Law at the time when the particular offence was committed if the legislator later amended the respective norm of the Criminal Law, recognising this offence as not being criminally punishable (*see Judgement by the Constitutional Court of 19 February 2021 in Case No. 2020-23-01, Para 21.4. and Para 24.*).

Hence, the Constitutional Court must establish whether the criminal offence, envisaged in the contested norm of the Criminal Law, was recognised as no longer being criminally punishable by the Amendments of 21 April 2016 or whether Section 81 of the Criminal Law is more favourable to the Applicant compared to the contested norm of the Criminal Law, pursuant to which he had been made criminally liable and punished.

**21.2.** The Applicant holds, essentially, that the legislator, by adding to the new wording of the legal norm the reference “in a manner not provided for in the *Satversme*”, had recognised as not being criminally punishable public invitation to turn against the independence of the Republic of Latvia as a state in a manner provided for in the *Satversme*.

The Legal Bureau of the *Saeima*, examining the draft law “Amendments to the Criminal Law” (draft law No. 514/Lp12) in the first reading, proposed in its opinion, *inter alia*, including the reference that the regulation applies to unlawful activities in Section 81 of the Criminal Law (*see Opinion by the Legal Bureau of the Saeima of 17 March 2016 on the draft law “Amendments to the Draft Law”*

(*Law Reg. No. 514/Lp12*), available: [www.titania.saeima.lv](http://www.titania.saeima.lv)). The President in his letter to the Legal Bureau of the *Saeima* also noted that Section 81 of the Criminal Law should include a reference that criminal liability sets in only for anti-constitutional actions (*see Case Materials, Vol. 3, pp. 20–22*).

The proposal to add to the disposition of Section 81 of the Criminal Law the words “in a manner not provided for in the *Satversme*” had been submitted for the second reading by the Minister of the Interior who noted that this would eliminate the possibility to interpret this norm in a way to allow making a person criminally liable in cases when they exercise their rights, provided for in the *Satversme* (*see Case Materials, Vol. 3, pp. 3–6, pp. 8–12*).

When the proposal was reviewed for the second reading, both members of the Legal Committee of the *Saeima* and legal experts expressed different opinions on the meaning of the words “in a manner not provided for in the *Satversme*” and their impact on the qualification of the criminal offence envisaged in Section 81 of the Criminal Law, pointing out that these words made the wording of the section incomprehensible, as well as that they had no impact on the qualification of the criminal offence (*see Case Materials, Vol. 2, pp. 32–69*). At the sittings of the standing working group on Criminal Law of the Ministry of Justice, its members also noted that the Criminal Law envisaged liability only for unlawful actions and, thus, there would be no grounds to make liable a person who was exercising their constitutional rights (*see Case Materials, Vol. 4, pp. 48–52, pp. 57–58*).

*Dr. iur. Jānis Pleps* has expressed the opinion that the legislator cannot substantially decide on an issue, which should be resolved on the constitutional level, by a subordinated legal act – the Criminal Law. Only the *Satversme* itself, i.e., a constitutional-level provision may envisage, which activities would be constitutionally permissible and which would be anti-constitutional (*see Dr. iur. Jānis Pleps’ Opinion in Case Materials, Vol. 3, pp. 67–71*). The reference “in a manner not provided for in the *Satversme*” only specifies the type of the invitation expressed but does not change the content and meaning of the action (*see also Dr. habil. iur. Uldis Krastiņš’ Opinion in Case Materials, Vol. 3, pp. 41–44*). Hence, Section 81 of the Criminal Law, envisages, *inter alia*, criminal liability for the same criminal offence, which was envisaged in the contested norm of the Criminal Law.

Comparison of the penalties set out in both legal norms leads to the conclusion that the penalty is more severe for the offence envisaged in Section 81 of the Criminal Law. Namely, this section provides for deprivation of liberty for

the term up to five years, whereas the contested norm of the Criminal Law provided for deprivation of liberty for the term up to three years. Pursuant to Section 5(3) of the Criminal Law, law, which increases the punishment, does not have retroactive effect. Several of the summoned persons pointed to this (*see, for example, Dr. habil. iur. Uldis Krastiņš' Opinion in Case Materials, Vol. 3, pp. 41.–44 and Mg. iur. Evija Vīnkalna's Opinion in Case Materials, Vol. 4, pp. 66.–71*). Hence, the wording of Section 81 of the Criminal Law cannot be considered as being more favourable to the applicant but, quite to the contrary, as being less favourable.

The Applicant's arguments regarding the incompatibility of the contested transitional provision with superior legal norms are based on the assumption that Section 81 of the Criminal Law comprised regulation that is more favourable to him but, since the Amendments of 21 April 2016 did not envisage recognising the criminal offence, envisaged in the contested norm of the Criminal Law, as not being criminally punishable and the new regulation is not more favourable to him in any other way, it cannot be established that the Applicant's fundamental rights had been infringed upon.

**Hence, on the basis of Para 6 of Section 29 (1) of the Constitutional Court Law, legal proceedings also in the part regarding compliance of the contested transitional provision with Article 1 and the second sentence of Article 92 of the *Satversme* shall be terminated.**

In view of the above and on the basis of Para 6 of Section 29 (1) of the Constitutional Court Law, the Constitutional Court

**held :**

**to terminate legal proceedings in case No. 2021-34-01 “On the compliance of Section 82 (1) of the Criminal Law in the wording which was in force from 1 April 2013 until 10 May 2016 with the first sentence of Article 100 of the *Satversme* of the Republic of Latvia, and on the compliance of the transitional provision of the law of 21 April 2016 “Amendments to the Criminal Law” with Article 1 and the second sentence of Article 92 of the *Satversme* of the Republic of Latvia”.**

The decision is not subject to appeal.

Chairperson of the court hearing

Aldis Laviņš