*ISSN 1392 – 0758 SOCIALINIAI MOKSLAI. 2012. Nr. 2 (76)*

# Liberal Construction of the Composition of the Criminal Act and the Maxim *Nullum Crimen Sine Lege*: the Intersection and the Solution

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crossref http:/dx.doi.org/10.5755/j01.ss.76.2.1962

## Abstract

**The article analyzes compatibility between the liberal construction of the composition of the criminal act and the maxim *nullum crimen sine lege*. The article reveals the historical evolution and the development of the maxim *nullum crimen sine lege* which has affected the formation of the current concept, the content of *nullum crimen sine lege certa* and *nullum crimen sine lege stricta* (two elements of the maxim which have the main role for the topic), as well as the concept of the liberal construction of the composition of the criminal act. Finally, conclusions are drawn defining the cases when the liberal constructions of the composition of the criminal act may be legally used in Criminal Law.**

***Keywords:*** **criminal law, maxim 'nullum crimen sine lege', liberal construction, composition of criminal act.**

## Introduction

Criminal Law is a strictly formalized branch of Continental Law system, while liberal constructions are indeterminate and depend on evaluation of facts and circumstances. Nevertheless, these constructions are being used in Criminal Law both in Continental and Common Law systems. According to that, the main goal of the article is to check the compatibility between the liberal construction of the composition of the criminal act and the maxim *nullum crimen sine lege*. The study after a general discussion of the problems of the object is concentrated to the specific case of Lithuania.

The object of the investigation is divided into two main parts: 1) the content of the maxim *nullum crimen sine lege* and 2) the usage of the liberal constructions in the legislation of the criminal act. Individual parts of the object have not been practically studied by the scientists of Lithuania. It should be emphasized that liberal constructions have been discussed conceptually only some Lithuanian authors: Pavilonis, Apanavicius, Bieliunas, Svedas, etc[1]. However, individual liberal constructions of particular compositions of the criminal acts have been discussed by a wider range of authors.

Moreover, the works investigating both parts in conjunction are still very rare not only in Lithuania but also overseas. Researchers' indifference to the topic is open to criticism, because it still remains unsolved problem in the field of Criminal Law. It should be noted that further legislative trends in the field of Criminal Law directly depend on the solution of this issue. Moreover, liberal constructions of the composition of criminal act in the hands of a despotic government may become a powerful instrument to violate person rights and liberties.

The topicality of the article is related mostly to the field of the Republic of Lithuania – to the fact that recently the legislation of the criminal act has intensified. The Criminal Code of the Republic of Lithuania (Official Gazette 'Lietuvos Zinios', 2000, No. 89-2741) (hereinafter – the CC) since the year 2000[2] has been amended 37 times, including 15 times in the recent three years period[3] (12 amendments has been related to the Special part of the CC). Single amendments may destroy the whole system of the CC because they are not systematically harmonized. Moreover, draft compilers of such amendments usually are different as well. One of the biggest defects of such amendments is poor formulation of the constituent features of the composition of the criminal act that directly makes an influence on their application in practical work. Furthermore, according to Svedas and Prapiestis (2011, p. 21-22), the interpretation of particular liberal constructions directly in the CC should be treated critically or at least controversially.

The article consists of three parts. The first part of the article reveals the historical evolution and the development of the principle *nullum crimen sine lege* which have affected the formation of the current concept. The principle *nullum crimen sine lege* in general means that 'there can be no crime committed without a criminal law'. However, the content of the principle is much broader and consists of some integral parts which are defined in the first part of the article. The second part of the article discusses the content of *nullum crimen sine lege certa* and *nullum crimen sine lege stricta* – two elements of the principle which have the

[1] It is worth to mention that the basement of Lithuanian theory of liberal construction is based mostly on Russian Criminal Law doctrine (e.g. authors: А.Н. Трайнин, В.Н. Кудрявцев, Т.В. Кашанина, А.В. Наумов, etc.).

[2] The year of the adoption of the CC

[3] Access via internet: http://www3.lrs.lt/pls/inter3/dokpaieska.susije_l?p_id=111555&p_rys_id=1

main role for the topic. The third part of the article reveals the conception of the liberal construction of the body of the criminal act and analyzes its main clash points with the principle of *nullum crimen sine lege*. In the end of the article cases when the liberal constructions of the body of the criminal act may be legally used in Criminal Law are identified.

The following non-empirical methods are employed in the article: *comparative* (used for reviewing and comparing a variety of different ideas of foreign academics and regulatory sources); *logical (inductive and deductive)* (used for analysis, evaluation and selection of the most important information for the topic). The article draws on the analysis of specialized literature.

## 1. The origin, the concept and the content of the maxim *Nullum Crimen Sine Lege*

The maxim *nullum crimen sine lege* in general means that 'there can be no crime committed without a criminal law' (translated from the Latin). The references to the maxim reach the oldest written sources of Criminal Law where certain acts were criminalized and penalties were provided for committing them. The sources of the maxim were found in the Eighteenth century BC in Hammurabi Code. The maxim *nullum crimen sine lege* could be inferred only in the abstract because it was not yet formally defined. In the Fourth century BC the Ancient Greek court in the case Timokrates vs. Athenian Ambassadors for the first time held that the law is not retroactive (Vinogradoff, 1922, p. 139-140). Nevertheless, the roots of the maxim *nullum crimen sine lege* are not Greek, but Latin. According to D'Angelo (1927, p. 157), the origin of the maxim is from the Constitutions of Roman emperors: Constantine (306-337 AD), Anastasius (491-518 AD) and Justinian (527-565 AD), as well as from Justinian' Novellae (535-539 AD). However, one may note that the maxim in the initial phase of its existence was only tacit and formally undefined.

In the year 1215 the maxim *nullum crimen sine lege* was formally defined in the supreme power legal act, i.e., in the Article 39 of *Magna Carta Libertatum* (Loucaides, 1995, p. 32). It guaranteed that no free man shall be deprived of his rights unless by legal judgment of his peers or by the law of the land. The Age of Enlightenment was the period when the maxim *nullum crimen sine lege* was further developed and improved, and reached the level of conception that is very close to nowadays. The master work of Montesquieu (1689–1755) 'The Spirit of the Laws' played a very important role. It was originally published anonymously in 1748 and quickly rose to a position of enormous influence. Thanks to Montesquieu, the maxim *nullum crimen sine lege* was formally established in the Article 8 of the French Declaration of the Rights of Man and of the Citizen (1789). The German legal scholar Anselm Von Feuerbach was the originator of the maxim *nullum crimen, nulla poena sine praevia lege poenali*: 'There's no crime and hence there shall not be punishment if at the time no penal law existed'. The maxim for the first time was named in the wording as it is now and defined in the famous code of Bavaria. Nevertheless, even in the Age of Enlightenment the maxim *nullum crimen sine lege* was perceived quite one-sided. It mostly focused only on the classic character of the principle - non-retroactivity of the law (Mokhtar, 2005, p. 47).

In the 20th century the maxim *nullum crimen sine lege* was defined in many essential international human rights documents. For example, this principle can be found in the Article 11(2) of the Universal Declaration of Human Rights *(Official Gazette 'Lietuvos Zinios', 2006, No. 68-2497)*, in the Article 15 of the United Nations International Covenant on Civil and Political Rights *(Official Gazette 'Lietuvos Zinios', 2002, No. 77-3288)*, in the Article 7 of the European Convention on Human Rights *(Official Gazette 'Lietuvos Zinios', 2011, No. 156-7390)*, etc.

The conception of the maxim *nullum crimen sine lege* currently is no longer focused solely on the non-retroactivity of Criminal Law. However, this feature still plays the main role for the concept of the principle it is no longer the sole. In Article 22 of the Rome Statute of the International Criminal Court *(Official Gazette 'Lietuvos Zinios', 2003, No. 49-2165)* the content of the maxim *nullum crimen sine lege* is defined: '1. A person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court. 2. The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted. 3. This article shall not affect the characterization of any conduct as criminal under international law independently of this Statute'.

The interpretation of the principle *nullum crimen sine lege* by individual countries abroad is very different. It differs in spite of the fact that in many countries the maxim *nullum crimen sine lege* has been defined in Constitutions (Boot, 2002, p. 81). The biggest reason for this situation is the differing law doctrine in various countries. It should be noticed that the disclosure of the content of every law principle depends mainly on the law doctrine. Principles of law are the categories of eminently highness of abstraction and their content may be construed variously (Lastauskiene, 2006, p. 70). Moreover, different interpretation of the maxim is related to the grammatical structure of the principle and the terms used in it. As it was noticed, the principle *nullum crimen sine lege* in general means that 'there can be no crime committed without a criminal law'. However, both terms – *criminal law* and *crime* are interpreted differently depending on the system of law. According to that, there are even more different interpretations when these two terms are used in one definition of the principle.

It is natural that in the doctrine of Criminal Law You can find more elements of the content of *nullum crimen sine lege* than there are defined in the Rome Statute of the International Criminal Court. The four-element classification is common. The content of maxim *nullum crimen sine lege* consists of: 1) *nullum crimen sine lege praevia* (the principle of non-retroactivity); 2) *nullum*

*crimen sine lege scripta* (only a criminal law can recognize particular act as criminal); 3) *nullum crimen sine lege certa* (the principle of certainty); 4) *nullum crimen sine lege stricta* (the prohibition against analogy).

## 2. The requirements of *nullum crimen sine lege certa* and *nullum crimen sine lege stricta*

This part of the article analyzes *nullum crimen sine lege certa* and *stricta* – the elements of the maxim which play the main role for the topic. Generally *nullum crimen sine lege certa* means that the features of criminal act should be precisely and clearly defined in criminal statute. According to Loucaides (1995, p. 34), this maxim obliges the legislator do not use too broad and generic terms in formulation of criminal statute. Thus the main features of *nullum crimen sine lege certa* are accuracy and clarity. Clarity of the legal language of the law means the perception and understanding of it, while accuracy is associated with a more precise formulation of legal definitions. In summary, the clarity is associated more with the content standards and the accuracy more with the formulation of the legal rule. The requirement of accuracy is very important in criminal, tax, and all other acts that are directly related to the restrictions of human rights. On the other hand, the accuracy is not required in defining the general principles of law. According to Xanthaki (1988, p. 11-12), the definitions of the law require more accuracy than clarity. To address the hierarchy of these two features is not a simple task. There is an opinion that clarity is more important than accuracy in the field of substantive Criminal Law, while in the field of Criminal Procedure Law the accuracy goes ahead. Moreover, the definition should be clear and unambiguous and only after that accurate in cases where it is mostly applied by non-professionals. On the contrary, if the rule of law is addressed to lawyers, it should be accurate first of all. Lawyers naturally understand the legal language more clearly than ordinary people therefore they are looking not for the true meaning of the rule but for ways to adapt it. In this context, it is clear that the accuracy and clarity are two sides of *nullum crimen sine lege certa* which in different situations have different levels of importance, but in general, both necessary and no less important than the other for the efficient functioning of the written law.

The significance of clarity and accuracy is very high in Criminal Law. First of all, without clarity and accuracy law loses predictability. Secondly, the government may expect the required behaviour from the public only if it has issued a clear and accurate rule of law, which at the same time, is understandable to the public. Third, the rule of law must be clear and understandable to the officials who have the discretion of applying it. On the contrary, problems of applying it properly can arise. Fourth, the interpretation of such a rule of law may become complicated as well. On the other hand, because of the complexity of the legal language the legislator in some cases is forced to depart from precise accuracy and clarity. For example, when the sphere of legal relations is so broad, that it would be practically impossible to regulate it all in detail; or when the legislator specially gives the discretion for the officers to apply a rule, etc.

The unintelligibility, complexity, a large gap from everyday language – these are the main reasons why the 'plain language concept' has been developed in the Common Law system (Barnes, 2006, p. 97-99). The 'plain language concept' covers only those terms which are understandable to any person (Sullivan, 2001, p. 149). According to Chapman (1991), 'Plain language is a technique of organizing information in ways that make sense to the reader, and thinking about your reader first and foremost and using language that is appropriate for your audience's reading skills'. On the other hand, this concept cannot be made absolute and the legal language cannot be made too simple. According to Sutherland (1993, p. 168), the simplicity of the legal language should not affect the legal power limits of the rule of law.

*Nullum crimen sine lege stricta* is very similar to *nullum crimen sine lege certa*. Their contents are often disclosed together. For example these two principles both are defined in Paragraph 2 Article 22 of the Rome Statute of the International Criminal Court: 'The definition of a crime shall be strictly construed and shall not be extended by analogy'. In general, *nullum crimen sine lege stricta* means the prohibition of analogy in Criminal Law. The prohibition against analogy in Criminal Law is directly linked to the prohibition against retroactivity and hence a generally accepted component of the *nullum crimen sine lege* principle. This means that a judge is obliged not to fill a gap by applying a criminal statute beyond its wording or by extending a precedent through the creation of a new unwritten crime. It is very important to dissociate the interpretation of law, which is a positive subject even in formal Criminal Law, from analogy, which is prohibited. From the narrow point of view the interpretation of law means the establishment of the true meaning and purpose of laws and rules, which are in conflict, in the process of applying the law (Mikeleniene and Mikelenas, 1999, p. 139). Dissociation of these two different institutions is essential in realization when there is an infringement of *nullum crimen sine lege stricta* and when such a breach does not exist.

The problems of separation the interpretation of law from analogy have long historical roots. More than a hundred years ago it was quite archaic. In the year 1899 one famous case of German courts arose[4]. Section 2, Paragraph 1 of the Criminal Code of the German Reich provided: 'An act may be punished only if the punishment was statutorily determined before the act was committed[5]'. The plot of the case was: A man rented an apartment that was furnished with electricity. A meter measured the amount of current which was consumed; however the tenant withdrew the current before it reached the meter. Criminal proceedings for theft were eventually brought against him. However, the court wrote that theft, according to the text of section 242 of the Criminal Code, can be

[4] Judgment of May 1, 1899, Reichsgericht, 32 Entscheidungen des Reichsgerichts in Strafsachen [RGSt] 165.
[5] Strafgesetzbuch fur das Deutche Reich [RStGB] (1871).

perpetrated only upon 'things'. The court found that 'things', according to the concept of German and Roman law, are physical objects which occupy a given space. Since case law was bound to his historical juristic meaning of the word, electricity could not be conceived of as a 'thing' but only as a flowing force. The court made some general remarks that show the heart of the problem with the borderline between interpretation and extending the law by analogy in Criminal Law. In the court's view, criminal act could only guarantee law and order and personal freedom if it was administered according to the original historical juristic meaning of words. Thus, such a strict interpretation allowed gaps in the Criminal Code to emerge. The decision was a new statutory provision concerning extent of punishment for appropriation, as opposed to theft, of electrical energy (Naucke, 1986, p. 535-537).

The historical court decision identified the main legislative problem – the detail and strict regulation opens a way for new gaps. The ordinary amendment of statute becomes only the temporary decision of solving the problem, because it is even technically impossible to regulate every factual circumstance. On the other hand, the thoughtful disquisition of legal text would have avoided the excess legislation, but according to the doctrine of that period, would have violated the maxim *nullum crimen sine lege stricta*. This is why the historical interpretation of law over the time was rejected: it failed to solve the problems of gaps in Criminal Law.

After half a century a radical development of the prevailing view appeared. This new development denies, with great acumen, the very possibility of any distinction between interpretation and analogy. Under this view, interpretation of a statute always involves analogical reasoning, and for that reason analogy does not violate the maxim *nullum crimen sine lege* (Hassemer, 1981, p. 252). In law literature, the example of the highest West German court of appeals in criminal cases in Judgment of April 5, 1951[6] is often used. In this case an accused has, through trickery, given his victim a narcotic in his drink. When the victim has fallen fast asleep, the accused took away property belonging to the victim. Robbery, under the language of the permanent statute, presupposes a taking by force. The Highest West German court of appeals in criminal cases freed itself from this established usage and construed the administration of narcotics to a victim by trick as 'force'. The court expressly indicated that one must take into account changed social circumstances and described this method as 'natural view' (in German 'natürlichen Betrachtung'). Under the old doctrine this would have been treated as forbidden expansion of liability by analogy. Under the more modern doctrine, however, this is simply the obvious result of the fluid borderline between interpretation and analogy.

In summary, there are two main doctrines analyzing the ratio between interpretation and analogy. According to the first one, these two subjects differ one from the other, but that difference is very fluid. In accordance with the other one, the interpretation is the same thing as analogy. The author agrees with the position of the researchers who tell that interpretation differs from analogy due to its purpose. According to Wessels (2003, p. 36), the purpose of interpretation is to reveal the meaning of the law and in some cases to adapt it to the changed needs and attitudes. While the purpose of analogy is to fill the gaps of law by further expanding and developing legal regulation, i.e., creating a new law. The same arguments are pointed out by Mikeleniene and Mikelenas (1999, p. 160): the purpose of interpretation of law is to determine the true meaning of applicable law. The purpose of gap filling is to determine the rule of law (*analogia iuris* or *analogia legis*), in which application it becomes possible to fill a legal gap and solve the case. In accordance of these arguments, it is natural that interpretation of law does not violate *nullum crimen sine lege stricta* and law analogy does.

## 3. The Content of the Liberal Construction of the Composition of the Criminal Act and the Main Points of the Intersection with *Nullum Crimen Sine Lege*

The compositions of the criminal acts consist of strict and liberal constructions. The content of strict construction remains unchanged or changes very slightly over time. These constructions have a very strict meaning. This means that the law is based on a literal and narrow definition of the language without reference to the differences in conditions when the law was written and modern conditions, inventions and societal changes. Meanwhile, the content of liberal construction cannot be identified directly from the body of the criminal act[7]. It depends on the evaluation of the facts. Liberal constructions can adapt to the social, economic and political developments in the particular situation. The interpretation of liberal constructions develops along with social life and its standards. This means the interpretation of a document not only on the basis of actual words and phrases used in it but (unlike in strict construction) by also taking its deemed or stated purpose into account. According to that, the law based on liberal constructions grows old slower than the law determined with strict constructions. On the other hand, there are a lot of doubts about the conformity between the liberal constructions of the body of the criminal act and the principle *nullum crimen sine lege*.

It may be noted that liberal constructions differ from strict constructions mainly because the interpretation of liberal constructions is related more to the purpose and the scope of the rule of law than to the grammatical wording. Moreover, strict constructions usually do not require any interpretation because they are self-evident and precise. Meanwhile the accuracy of liberal construction is related to the accurate interpretation of the composition of the criminal act and the accurate evaluation of facts.

[6] Judgment of April 5, 1951 (Bundesgerichtshof, W. Ger. 1 BGHSt). Access via internet: http://www.servat.unibe.ch/dfr/bs001145.html

[7] For example, liberal constructions in the CC: major damage; reason of disorderly conduct; disrupting public peace, etc.

It should be noted that for a long period of time there was presumed in the Continental Law doctrine that legal texts could be formed only by using strict constructions, while liberal constructions violated the maxim *nullum crimen sine lege*. However, in the middle of 20th century, mainly due to the practical benefits, the requirements for the legal language became less rigorous and formal. On the other hand, nevertheless the requirements became less rigorous and the scholars' attitude to the question became more indulgent, still there is not one single opinion if the existence of these constructions in Criminal Law is legal. The main reason for that is the different interpretation of principles *nullum crimen sine lege certa* and *nullum crimen sine lege stricta*.

On the other hand, there a lot of arguments and questions in the plot of this topic, still there are no answers. In addition, if strict and liberal constructions are being studied by scholars, they are usually being studied alone and separated one from the other (Mullins, 2000). Moreover, in Lithuania all the research is limited only to the analysis of separate constructions but not generally to the theoretical basement of liberal construction. It is being presumed that the theory of the feature of the composition of the criminal act still remains good enough, although it has not been examined for three or four decades already. No doubts, that there is a need of a qualitatively new approach to the theory of the constituent feature of the criminal act. Moreover, strict and liberal constructions should be researched together, without separation one from the other, through the analysis of their link and proportion. Posner (1983, p. 803) writes that forming the law merely with strict constructions means to limit its internal volume and the duration of the validity, forcing the Congress to work double capacity to achieve the same effect. No coincidence that most of the strict constructions are politically conservative nature and most liberal constructions are politically liberal. However, the other group of scientists does not support the liberal constructions and provides its own counter-arguments. For example, Scalia (1997, p. 28) thinks that courts use liberal constructions for their own and private purposes. Furthermore, according to the author, nothing is interesting in the real meaning of such type of constructions.

In spite of the above mentioned defects of strict and liberal constructions, one may note that meanwhile they are both being used in the legislation of the criminal act. There are no arguments due to the usage of strict constructions. They are necessary in Criminal Law because they correspond with formal certainty – one of the main features of the rule of law. The situation is different when talking about the liberal constructions of the composition of criminal act. Forasmuch as liberal construction is not accurate by itself and the interpretation of the liberal constructions is related more with the purpose and the scope of the rule of law nor with the grammatical wording, it is necessary to determine whether and how this conclusion correspond with principle *nullum crimen sine lege certa* which requires that the features of the criminal act should be precisely and clearly defined in criminal statute, as well as with *nullum crimen sine lege stricta* which prohibits analogy in Criminal Law.

According to Friedmann (1964, p. 52-53), it is typical to say that the principle *nullum crimen sine lege* requires criminal statute formed of strict constructions. In the situation when there are two or more possible alternatives for qualification the act and using grammatical and logical methods the alternative which narrows the possibility to qualify the act as criminal should be chosen. Paragraph 2 of Article 22 of the Rome Statute of the International Criminal Court declares the same idea: 'The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted'. This article holds three different principles of law: *nullum crimen sine lege certa*, *nullum crimen sine lege stricta* and *in dubio pro reo* (means that a defendant may not be convicted by the court when doubts about his or her guilt remain). According to this, the following may be presumed: a) it is recognized that criminal statutes must be accurate and analogy is prohibited, however, it is also stated that practically inaccuracy of criminal statute is possible, and it must be disguised using interpretation; b) in case of these two controversial statements the effect of *nullum crimen sine lege certa* must be narrowed by presuming that all inaccuracies of the criminal statute should be interpreted in favour of the person being investigated, prosecuted or convicted.

Ideally, *nullum crimen sine lege certa* is interpreted like the necessity of an accurate and obvious criminal statute. However, the ideal case would be possible only if this principle functioned alone in the sphere of Criminal Law and without any interactions with other principles of law. In reality the maxim *nullum crimen sine lege* does not function alone and could not do so. That is why the collision of principles appears, and it has to be solved. According to Theory of Law, the collision of principles has to be solved by applying them both, only narrowing their effect in the sphere of the collision. Because of this, the accuracy and clarity of criminal statute is only the priority but not the absolute provision in Criminal Law. No coincidence that the composition of the criminal act consists mostly of strict constructions in the Continental Law system. However, various legislative principles require not only that criminal statute would be accurate and obvious but also not overloaded, as simple as possible, without any legislation gaps, etc.

Too formalized and extraordinary criminal statute, as shows the Germans' court example of the first part of the article, leaves the possibility for legal gap to occur in every new single case. Thus, part of the dangerous and harmful acts would not formally be qualified as criminal acts, and the persons committed them would remain unpunished. Such situation may unbalance the whole legal system and create the precondition to violate persons' rights and liberties. It should be noted that the amendments of the law is very formalized and long process which includes all mandatory legislative stages (it may last months or even years). Pikelis (2011, p. 71) adds that the performance of

the system based only on the strict constructions would make the biggest harm, with no doubts, to the person whom the wrong law applied, because the amendments of the criminal act is very long process, and the mechanisms of harm compensation are not perfect and comprehensive.

Thus, the practical necessity for changing the legislation of the criminal statute occurs. According to Mikeleniene and Mikelenas (1999, p. 153), the rule of law must be universal; i.e., it should cover as many life situations as it can to avoid the extraordinary legislation for every action or event, and avoid of leaving legal gaps in the criminal act. This is why the liberal constructions must be used in the legislation of criminal statute.

Thus in an ideal case if *nullum crimen sine lege certa* functioned alone in the sphere of Criminal Law and without any coherence with other principles, liberal constructions of the composition of the criminal act would not correspond with it. However, in practice it does not function alone. Moreover, liberal constructions represent the values of the other principles of law. Wherefore, *nullum crimen sine leg certa* cannot prevent the usage of liberal constructions in Criminal Law. While the maxim *nullum crimen sine lege certa* protects the rights of individuals against their self-willed limiting by the authority, liberal constructions protects the same rights by another aspect – help to avoid legal gaps (i.e., help to avoid the situation when their rights might not be protected because the legislator had left the gap in the criminal statute).

Analyzing the compatibility between *nullum crime sine lege stricta* (the prohibition against analogy in Criminal Law) and liberal constructions of the composition of the criminal act, the main point is the question of the limits of the judges in facts and circumstances evaluation and rules of law interpretation in every single case. According to Dworkin (2004, p. 60), 'Discretion, like the hole in a doughnut, does not exist except as an area left open by a surrounding belt of restriction'. Discretion is the ability to make decisions which represent a responsible choice and for which an understanding of what is lawful, right or wise may be presupposed. One should note that the exercise of discretion by judges is an inherent aspect of judicial independence under the doctrine of the separation of powers. In the case of unlimited judge's discretion it may be difficult to distinguish and control whether the judge interpreting the composition of the criminal act, which is defined by liberal constructions, does not go too far (i.e. does not deviate from its true meaning and purposes of the legislator that may be treated as analogy of law) and does not violate *nullum crime sine lege stricta*. This situation may lead to self-willing of judges. Because of that reason the discretion of the judge must have its limits ('safeguards'). The Supreme Court of Lithuania stated that the concept of liberal construction mainly depends on the judge's discretion. On the other hand, the complete freedom of interpretation, which was not inhibited by the case law, does not exist. There is a possibility to apply such a feature in other way than case law only if accumulated experience is overviewed and argumentation found why it does not fit to the particular circumstances[8].

Mullins (2000) purifies the 'safeguards' of the interpretation of the liberal constructions. In his opinion, liberal constructions are not 'liberal' in the sense that it is not available to interpret the criminal statute by avoiding its context. In other words, it is not available to ignore the system and purposes of the criminal statute. The interpretation of these constructions cannot be based only on priorities of the judge or a vision of the defence lawyer. According to this, the author emphasized two very important criteria for the interpretation of the liberal constructions: 1) the requirements of the criminal act's system; 2) the purpose of the criminal act which is being interpreted.

Thus the harmony between *nullum crime sine lege stricta* and liberal constructions of the composition of the criminal act is possible if case law defines particular limits ('safeguards') for facts and circumstances evaluation, as well as interpretation of liberal constructions, and the judge takes those limits into account and does not breach them. From historical point of view, hundred years ago these limits were historical juristic meaning of the word. Nowadays such criteria could be the internal purpose of the criminal statute, the objective and sphere of the regulation, the systemic links between the compositions in the criminal act, as well as the specific of changed life circumstances. It is important to notice that these criteria should arise from the case law and not from the theory. Paragraph 4 of the Article 33 of Law on Courts of the Republic of Lithuania *(Official Gazette 'Lietuvos Zinios', 2006, No.* 17-649*)* provide, that when adopting decisions in the particular cases, the courts are bound by their own established rules of interpretation developed in parallel or substantially similar cases. The courts of lower instances adopting decisions in the particular cases must take into account the rules of interpretation developed in parallel or substantially similar cases by the courts of higher instances. The existing case law may be changed and the new rules may be formed only if it is inevitable and objectively necessary.

It is possible to validate the compatibility between the liberal constructions and *nullum crimen sine lege stricta* only if the case law forms the criteria which limits but not eliminates the judge's discretion to evaluate the facts and circumstances. Without any case law in different categories of cases or if such practice is very rare (e.g., crimes against humanity and war crimes), liberal constructions in Criminal Law still remains very problematic topic which depends only on the professionalism and morality of every single judge, and possibly violates the maxim *nullum crimen sine lege stricta*.

[8] November 29, 2005 Judgment of the Supreme Court of Lithuania in the case No. 2K-7-638/2005.

## Concluding remarks

1. The principle *nullum crimen sine lege* in general means that 'there can be no crime committed without a criminal law'. However, the content of the principle is much broader and consists of some integral parts, such as *praevia, scripta, stricta* and *certa*. Although the sources of the maxim were related mainly with *praevia* (the principle of non-retroactivity), nowadays the prohibition of analogy, absoluteness and formality of the criminal statute, its clarity and accuracy are being accented.
2. The accuracy of liberal construction is related more to the accurate interpretation of the composition of the criminal act and the accurate evaluation of facts than on accurate wording.
3. Ideally, *nullum crimen sine lege certa* is interpreted like the necessity of accurate and obvious criminal statute. However, the ideal case would be possible only if this principle functioned alone in the sphere of Criminal Law and without any interactions with other principles of law. In the reality the maxim *nullum crimen sine lege* does not function alone and could not do so. That is why the collision of principles appears, and it has to be solved. According to the Theory of Law, the collision of principles has to be solved by applying them both, only narrowing their effect in the sphere of the collision. Because of that, the accuracy and clarity of criminal statute is only the priority but not the absolute provision in Criminal Law.
4. The effect of *nullum crimen sine lege certa* is narrowed by the maxim *in dubio pro reo*. It is recognized, that criminal statutes must be accurate, and analogy is prohibited, however, it is also stated that practically inaccuracy of criminal statute is possible, and it must be disguised by interpretation. In case of these two controversial statements, the effect of *nullum crimen sine lege certa* must be narrowed by presuming that all inaccuracies of criminal statute should be interpreted in favour of the person being investigated, prosecuted or convicted.
5. The compatibility between *nullum crimen sine lege stricta* and the liberal constructions of the composition of the criminal act is possible, if the case law defines particular limits ('safeguards') for facts and circumstances evaluation, as well as interpretation of liberal constructions, and the judge takes those limits into account and does not breach them. The court should follow those criteria, and in the cases it does not follow them, it should properly motivate such a decision.

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P. Veršekys

**Vertinamasis nusikalstamos veikos sudėties požymis ir *nullum crimen sine lege* principas: sankirta ir jos sprendimas**

Santrauka

Straipsnyje „Vertinamasis nusikalstamos veikos sudėties požymis ir *nullum crimen sine lege* principas: sankirta ir jos sprendimas“ analizuojama baudžiamojoje teisėje stipriai veikiančio *nullum crimen sine lege* principo ir vertinamųjų nusikalstamos veikos sudėties požymių tarpusavio dermė. Straipsnio tikslas – patikrinti vertinamųjų nusikalstamos veikos sudėties požymių ir *nullum crimen sine lege* principo atitikimą.

Pirmoje dalyje atskleidžiama *nullum crimen sine lege* principo istorinė raida ir vystymasis, lėmę dabartinės jo sampratos susiformavimą. Principo užuominos siekia seniausius rašytinius baudžiamosios teisės šaltinius: ištakų randama jau XVIII amžiuje prieš Kristų gyvavusiame Hamurabio teisyne, Konstantino (306-337 m. po Kristaus), Anastazijaus (491-518 m. po Kristaus) ir Justiniano (527-565 m. po Kristaus) Konstitucijose, o vėliau ir Justiniano Novelose (535-539 m. po Kristaus). Pirmą kartą principas formalizuotas 1215 m. Anglijoje, Didžiojoje laisvių chartijoje, o samprata labiausiai evoliucionavo Švietimo laikotarpiu, t.y. principą įtvirtinus 1789 m. Prancūzijos žmogaus teisių deklaracijoje. Dabartinį *nullum crimen sine lege* principo pavadinimą 1801 m. suformulavo Anzelmas Feuerbachas knygoje „Kūniškos bausmės“.

*Nullum crimen sine lege* principas bendrąja prasme reiškia, kad „nėra nusikaltimo be įstatymo”. Tačiau šio principo turinys yra žymiai platesnis ir šiuo metu doktrinoje skaidomas į keletą pagrindinių sudėtinių dalių: *praevia, scripta, stricta* ir *certa.* Nors principo ištakose sietas tik su *praevia,* t.y. su baudžiamojo įstatymo galiojimo laiku, šių laikų doktrinoje *nullum crimen sine lege* interpretuojamas plačiau – papildomai akcentuojamas baudžiamojo įstatymo absoliutumas ir formalumas, analogijos draudimas ir tokio įstatymo formuluočių tikslumas bei aiškumas.

Antrojoje dalyje aptariamas tematikai svarbiausių principo elementų - *nullum crimen sine lege certa* ir *nullum crimen sine lege stricta* - turinys. *Nullum crimen sine lege certa* principas reiškia, jog nusikalstamos veikos požymiai baudžiamajame įstatyme turi būti tiksliai ir aiškiai apibrėžti, o *nullum crimen sine lege stricta* reiškia draudimą taikyti bet kokią analogiją baudžiamojoje teisėje. Aiškumo ir tikslumo elementų svarba baudžiamojoje teisėje yra labai didelė. Pirma, be tikslumo ir aiškumo teisė praranda nuspėjamumą. Antra, tik išleidusi aiškią ir tikslią normą, suprantamą visuomenei, valdžia gali tikėtis ir iš visuomenės reikalaujamo elgesio. Trečia, teisės norma turi būti aiški ir suprantama pareigūnams, įgaliotiems ją taikyti, priešingu atveju ši norma gali būti arba apskritai netaikoma, arba toks taikymas nukryps nuo įstatymo leidėjo valios. Ketvirta, pasunkėja, net tampa neįmanomas ne tik dviprasmiškos, neaiškios normos taikymas, bet ir jos vykdymas bei interpretavimas (aiškinimas).

Teisinės kalbos nesuprantamumas, sudėtingumas, didelis atitolimas nuo buitinės kalbos – tai pastaruoju metu teisinėje literatūroje išskiriama kaip viena esminių teisinio neaiškumo ir netikslumo priežasčių, dėl kurios Bendrosios teisės sistemoje buvo išplėtota „paprastos kalbos“ koncepcija (originalus pavadinimas anglų kalba – *plain language concept*). „Paprastos kalbos“ koncepcija apima tik tokius terminus, kurie yra suprantami bet kuriam asmeniui, o jų turinio kitimą nėra sunku nuspėti. Tai kalba, kuri pašalina bet kokį gramatinį neaiškumą, per daug „išpūsto“ žodyno vartojimą ir painią sakinių struktūrą iš teisinių tekstų. Geriausią „paprastos kalbos“ apibrėžimą yra pateikusi C. Chapman, anot jos, „paprasta kalba“ yra informacijos pateikimo skaitytojui technika tokiomis kalbinėmis formuluotėmis, kurios atitinka jo skaitymo įgūdžius. Kita vertus, negalima šios koncepcijos suabsoliutinti ir paversti teisinę kalbą pernelyg buitine kalba, nes dėl to nukentėtų normos teisinė galia.

Analogija – tai tie atvejai, kai teisinės nuostatos plačiau taikomos įstatymo nesureguliuotiems ar pagal įstatymo prasmę neapimtiems santykiams. Teorijoje išskiriama teisės analogija (kai teisės spraga užpildoma remiantis bendraisiais teisės principais) ir įstatymo analogija (kai teisės spraga užpildoma remiantis panašius santykius reglamentuojančiomis teisės normomis). Teisės aiškinimas baudžiamojoje teisėje, priešingai nei analogija, yra galimas ir pozityvus reiškinys. Straipsnyje daroma prielaida, kad tik atribojus teisės aiškinimą nuo analogijos, galima pagrįsti vertinamųjų nusikalstamos veikos sudėties požymių atitikimą *nullum crimen sine lege stricta.*

*Nullum crimen sine lege certa* veikimą taip pat siaurina *in dubio pro reo* principas. Aiškinant Tarptautinio baudžiamojo teismo Romos statuto nuostatas, pripažįstama, kad baudžiamieji įstatymai turi būti tikslūs, o analogija negalima, bet kartu konstatuojama, kad praktikoje įmanomi ir įstatymo netikslumai, kuriuos būtina išaiškinti. Šios dvi iš pirmo žvilgsnio nesuderinamos pagrindinės nuostatos siaurina *nullum crimen sine lege certa* veikimą preziumuojant, kad baudžiamojo įstatymo netikslumai aiškinami kaltinamojo naudai.

Trečioje straipsnio dalyje atskleidžiama vertinamųjų nusikalstamos veikos sudėties požymių samprata tiek Kontinentinėje, tiek Bendrojoje teisinėje sistemoje ir analizuojami jų sankirtos su *nullum crimen sine lege* principu taškai. Nors dėl vertinamųjų požymių vartojimo baudžiamojo įstatymo tekste kyla daug ginčų ir klausimų, atsakymų ir tinkamo dėmesio šiai problemai trūksta. Be to, jei tokios konstrukcijos mokslininkų ir tiriamos, tai dažniausiai pavieniui, atskirtos viena nuo kitos. Lietuvoje visi tyrimai paprastai apsiriboja tik atskirų nusikalstamų veikų sudėčių analize, tačiau kompleksiškai sudėties požymių ir jų rūšių Lietuvoje pastaruoju metu niekas tirti nebando, preziumuojant, kad požymio teorija yra tinkama (nors nusistovėjusi ir netirta gerus tris dešimtmečius – aut. past.). Neabejotina, kad būtinas kokybiškai naujas požiūris į nusikalstamos veikos sudėties požymio teoriją ir požymių klasifikaciją, o vertinamuosius ir pastoviuosius požymius reikia tirti kartu, neatsietai, analizuojant jų tarpusavio ryšį ir santykį.

Vertinamųjų požymių turinys tiesiogiai nepaaiškėja iš nusikalstamos veikos sudėties, o priklauso nuo aplinkybių ir faktų vertinimo. Vertinamieji požymiai prisitaiko prie konkrečių socialinių, ekonominių, politinių valstybės ir visuomenės raidos aplinkybių. Kintant visuomeniniam gyvenimui, jo standartams, kinta ir vertinamųjų požymių aiškinimas. Atsižvelgiant į tai, teisė, paremta vertinamaisiais požymiais, sensta lėčiau nei apibrėžta pastoviaisiais požymiais, mažiau atsilieka nuo visuomeninio gyvenimo tėkmės. Kita vertus, dėl išvardintų vertinamųjų požymių savybių kyla daugiausiai dvejonių, analizuojant jų suderinamumą su formaliuoju *nullum crimen sine lege* principu. Išsamiai išanalizavus teorinę medžiagą, straipsnio pabaigoje identifikuojami atvejai, kai vertinamieji požymiai gali būti pagrįstai vartojami baudžiamajame įstatyme. Daromos išvados, kad įstatymo aiškumas ir tikslumas yra prioritetinė, bet ne absoliutinė teisinė nuostata baudžiamojoje teisėje, o vertinamųjų požymių tikslumas siejamas ne su tikslia formuluote, o su tiksliu faktinių aplinkybių vertinimu ir nusikalstamos veikos sudėties aiškinimu. Be to, teismų praktika privalo suformuluoti tam tikrus vertinamųjų požymių aiškinimo ir faktų vertinimo kriterijus - „saugiklius“, kad būtų apribotas teisėjo diskretiškumas, ir teismas, vertindamas faktines aplinkybes bei aiškindamas požymio turinį, tų kriterijų laikytųsi, o jei drįstų nesilaikyti – tinkamai tai motyvuotų.

*Reikšminiai žodžiai:* baudžiamoji teisė, vertinamasis nusikalstamos veikos sudėties požymis*, nullum crimen sine lege* principas.

First received: March, 2012
Accepted for publication: June, 2012