Abstract: Overcriminalisation

Objective

The analysis addresses some tendencies in Estonian criminal law with the aim of providing an initial assessment regarding the role of penal law in ensuring lawful behaviour, and penal practice. The author of the analysis would like to emphasise that a much more thorough examination is required to present reasoned suggestions to legislators and implementers of law in this area. The primary goal here is simply to articulate the problem.

The analysis relies on the data provided by the Ministry of Justice and the Police and Border Guard Board.[1] The data in the Punishment Register do not change in real time because they are entered in the punishment register with a slight delay. Moreover, the Punishment Register does not include information on the actual place of residence of an individual but the place of residence as given in a testimony or registered in the Population Register. Hence, the numeric data presented in the analysis should be viewed cautiously. At the same time, the presented numbers allow us to illustrate the main aspects of the analysis rather than only define the problem that is the subject of the analysis specifically.

Contents

The analysis comprises four parts.

Part 1 explains what is considered a criminal offence in the context of the European Convention on Human Rights, Part 2 provides a statistical overview of penalties passed and imposed in Estonia, Part 3 discusses overcriminalisation and its characteristics and Part 4 analyses the consequences of overcriminalisation and its potential hazards.

In the judgements of the European Court of Human Rights, criteria have been presented that help to assess whether the proceedings of a violation of legal order is deemed to be a criminal case for the purpose of Article 6 of the European Convention on Human Rights.[2] The following must be assessed: firstly, the classification of the violation of law based on national laws of the particular state; secondly, the nature of the violation of law, and, thirdly, the strictness and nature of the penalty imposed on the person who committed the offence.

Analysing numeric data from various registers allowed to present the hypothesis that state interference in Estonian society through the use of penal law is disproportionately extensive, in other words, we are dealing with overcriminalisation. In order to more accurately identify the signs of overcriminalisation, the existence of certain of its characteristics had to be determined. The characteristics of overcriminalisation were deemed to include: a large number of necessary elements of offences, the quality of a norm, a high number of offenders, an extensive discretionary power when applying a norm, an excessive consequence of a

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[1] The statistical data has been mainly obtained from the Punishment Register.

[2] Engel and others *vs.* Holland (1976) non-official translation available in the net: http://www.coe.ee/?arc=&op=body&LaID=1&id=158&art=219&setlang=est). In this decision criteria were phrased when a disciplinary case of a military serviceman should be viewed as criminal charges, although in later decisions these criteria have been specified further.
Convention for the Protection of Human Rights and Fundamental Freedoms. In the net: https://www.riigiteataja.ee/ert/act.jsp?id=78154.

criminal record, a norm that damages important values and moves away from significant procedural protective measures, the so-called “useful norm” and motivated proceedings.

Summary

To sum it up, it was found that
1) in the context of the European Convention on Human Rights, cautionary fines and punishments imposed with fine notices applicable in the misdemeanour procedure shall be considered a criminal punishment. Consequently, in such cases, the individual’s rights must be ensured at least at the level provided for in Article 6 of the European Convention on Human Rights. Estonian legislation does not currently provide such guarantees.

2) The principles of the misdemeanour procedure should be reviewed. A situation where there are no objective criteria against which to assess whether it is a minor misdemeanour or a misdemeanour does not conform to the requirement of clear definitions. Furthermore, the necessary elements of offences must be defined more clearly.

3) The state should take steps towards the unification of extra-judicial proceedings. The practices of bodies conducting extra-judicial proceedings (including cautionary proceedings) should be analysed.

4) The legislator must consider very carefully which violations in which areas deserve to be punished. Interference in the fundamental rights of a person with penal law must be *ultima ratio* and deviation from this principle may bring about material changes in legal order. It is also important that restrictions arising from a criminal record were reasonable and proportional.

The analysis of the characteristics of overcriminalisation showed that several of them exist in Estonia. Consequently, the legislator should take early steps to minimize the number of these signs. This would ensure uniform court practice and help develop the legal order in a positive direction.

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On the homepage of the Supreme Court, in Estonian (http://www.riigikohus.ee/vfs/995/2010_Lisa%202%20%28Ulekriminaliseerimine_analuus%29.pdf).

The analysis addressing overcriminalisation was published as an annex to the presentation of the Chief Justice of the Supreme Court to the *Riigikogu* (Estonian parliament).