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PROHIBITION OF UNCERTAINTY OF THE LAW IN CONTEMPORARY CRIMINAL LAW

ABSTRACT

Legal certainty requirement is the embodiment of the principle of legality and plays an important role in terms of criminal guarantee function, which on its part is of fundamental importance to individuals, so that they could foresee the prohibition and organize their actions. Uncertain norm bears the risk to of unjustified restriction of human freedom and the requirement of certainty is the guarantee to be protected from such restriction. This article aims to clarify the purpose and nature of Lex certa. Lex certa cannot establish requirement for absolutely certain provision, as the norm in its nature is abstract and often characterized by vagueness. Where the dividing line runs between allowed and disallowed uncertainty and how the line should be drawn will be the subject of discussion.

RÉSUMÉ

This article discusses the constitutional principle of prohibiting the uncertainty of the law and explains its meaning and objectives. General clauses are not considered to be in breach of Lex certa. Depending on the extent to which norm has a clear purpose and objective scope and the extent of clarity of the judicial interpretation, a dividing line is drawn between allowed and disallowed vague provisions.

This article analyzes the views expressed in court practice and scientific literature of various countries to draw a distinction between the inevitable vagueness and unacceptable uncertainty. In relation to the issue this article deals with tougher and more liberal interpretations and analyzes the risks characteristic to the latter. It also refers to a number of composition of crimes (conspiracy, incitement, etc.) which even though do not fall within the module of allowed uncertainty, still continue to operate and until today are the most common crimes. Therefore, this article is committed to introduce "sufficient certainty" – which is necessary and inevitable – instead of absolute certainty which is impossible in the real world. However the work also shares the trend for more and more expansion of the "allowed vagueness".

Among the legal principles that define the nature and content of the criminal law, the most important is the principle of legality, which is called "the first principle"[1] and also a "cornerstone"[2] of the criminal law. Characterization of the principle of legality with these words derives from the role it performs. An embodiment of the principle of legality is that there is no crime and punishment without law, which in Latin sound as follows: *nullum crimen/nulla poena sine lege*. Therefore, it is unacceptable to punish a person for conduct that did not constitute a crime at the time the conduct was committed and it is also unacceptable to render such a sentence, which was not provided by law at the time of commission of the crime. Thus, attribution of the guarantee function to the principle of legality is absolutely clear, because the State is bound by this imperative. It protects people from the arbitrariness and abuse of power by the state[3], guarantees to be informed in advance of the prohibition and a possible sentence[4]. Only in case of adherence with this rule it is possible to speak about the legitimacy of the punishment.

The principle of legality is the principle of constitutional rank in all the states of law, including Georgia, which is provided in paragraph 5 of Article 42 of the Constitution and the Criminal Code, it is given in the 2nd and 3rd Chapters[5].

1 Herbert L. Packer, The limits of the criminal sanction (California: Stanford University Press Stanford, 1968), 50.

2 Michel Rosenfeld Benjamin N., The Rule of Law and the Legitimacy of Constitutional Democracy, Southern California law review vol. 74 (2001), 1307; Nicola Lupo and Giovanni Piccirilli, The Relocation of the Legality Principle by the European Courts' Case Law. AnItalian Perspective, European Constitutional Law Review, Vol. 11, Issue 01 (May 2015), 56; M. Turava, General Part of the Criminal Law: The Doctrine of Crime (Tbilisi, Meridiani, 2011), 107;

3 Beth Van Schaack, Crimen Sine Lege: Judicial Lawmaking at the Intersection of Law and Morals, The Georgetown law Journal vol. 97(2008), 122; Herbert L. Packer (1968), 50.

4 Richard H. Fallon, Jr., The Rule of Law" as a Concept in Constitutional Discourse, Columbia Law Review Vol. 97, No. 1 (1997), 7. Regarding the goals of the principle of legality see: Ibid. 7-9; Michel Rosenfeld, 1307; Herbert L. Packer (1968), 50.

5 The same guarantees are given in the international instruments on human rights, including Article 7 of the European Convention on Human Rights and Article 15 of the Covenant on Civil and Political Rights.

As it is known the referred maxim was used by the German scientist Anselm Feuerbach in 1801 in his writing[6]. Feuerbach linked the *nullum crimen sine lege* rule to crime prevention purpose and underlined the importance of the prior notification to the addressees on the prohibition[7]. As it was noted in many scientific papers, the principle of legality has a much older history and the basics of it are found in the old Greek philosophy[8]. Magna Carta of 1215 is also notable, which was embodiment of the separation of powers and binding the government by the law[9]. The significance of the principle of legality is credited as "revolutionary" since it had such function in the prevention of usurpation of the separation of powers and the government[10].

19th century is named as the period for proliferation and promotion of the principle of legality. However, the process started in the second half of the 18th century[11]. Nowadays, none of the states of law exist without this principle. It is contained in constitutions and criminal codes of all such countries. As for the Georgian criminal law history, the principle of legality was enshrined

6 M. Turava (2011), 107, footnote 2; Stefan Trechsel, Human Rights in Criminal Proceedings, editors: Konstantine Vardzelashvili, Lali Papiashvili and others, translators: Vano Gogelia, Eka Lomtatidze and others (Tbilisi, 2009), 135; Devin O. Pends, Retroactive law and proactive justice: Debating crimes against humanity in Germany 1945-1950, Central European History 43 (September 2010), 439; Beth Van Schaack, (2008), 121 note 1; Markus D. Dubber, The Legality Principle in American and German Criminal Law: An Essay in Comparative Legal History (December 1, 2010), 16; Markus D. Dubber and Tatjana Hornle, Criminal law: A comparative approach (Oxford: Oxford University press, 2014), 72.

7 O. Pends(2010), 441; Giorgi Khubua, The Theory of Law (Tbilisi, Meridiani, 2004), 426.

8 Jerome Hall, General Principles of Criminal Law. Second Edition (1960), 59; Constitutional Law-Fair Warning of Retroactive Law Is Sufficient Compliance with the Ex Post Facto Clause-Do b Bert v. Florida, BYU Law Review, Volume 2(1978), 485; Allen Francis A., The habits of legality: criminal justice and the rule of law (New York: Oxford University Press. 1996), 3; Brian Z. Tamanana, On the rule of law: History, Politics, Theory 7 (Cambridge Univ. Press 2004), 7-10; Beth Van Schaack, (2008), 121. Note 1; Ricardo Gosalbo-Bono, The Significance of the rule of law and its implications for the European Union and the United States, University of Pittsburgh law review Vol. 72 (2010), 232-240; Markus D. Dubber (2010), 2; Joel Samaha, Criminal Law, ed. LindaSchreiber-Ganster, 10th edition(Belmont: Wadsworth Cengage Learning, 2011), 40; Michael Faure, Morag Goodwin and Franziska Weber, The Regulator's Dilemma: Caught between the Need for Flexibility and the Demands of Foreseeability. Reassessing the Lex Certa Principle, Rotterdam Institute of Law and Economics (RILE) WorkingPaperSeries N 03 (2013), 25-27.

9 J. Samaha (2011), 40; M. Faure and others (2013), 25.

10 John M. Scheb and John M. Scheb II, Criminal law 5th edition (Belmont: Wadsworth, 2009), 47.

11 Allen Francis (1996), 4. The principle of legality was reflected in 1776 constitutions of Virginia and Maryland, while it was enshrined within the French Constitution in 1791 and in the Constitutions followed within next years, while it was reflected in the Criminal Code in 1810; See Devin O. Pends (2010), 442; Thomas J. Gardner and Terry M. Anderson, Criminal law 11th edition (Belmont: Wadsworth, 2012), 12. According to research regarding the principle of legality, it was reflected in the Criminal Code of Bavaria in 1813, which was written by Feuerbach. This was followed in 1814 by Oldenburg Criminal Code, Württemberg 1819 Constitution, the Grand Duchy of Hesse and Thuringia in March 1841 on the 1850 Criminal Code. This was followed in 1814 by Oldenburg Criminal Code, Württemberg 1819 Constitution, the Grand Duchy of Hesse 1841 and Thuringia the 1850 Criminal Codes. See: O. Pends (2010), 443-444.

only from the second half of the 20th century[12]. Soviet Union Criminal Law allowed for application of the law through analogy to the detriment of an individual which was explained by abstract threats and challenges. It was neglected and replaced by the principle of legality only by the Criminal Code of 1960.[13] The principle of legality protects citizens from arbitrary use of force by the state and is the guarantor for the protection of their autonomy[14]. The emergence of this principle in positive law is explained by the struggle against absolute power of the state, which followed the establishment of the principle of separation of powers.[15] Therefore, it is not surprising that in the 30-ies of the 20th century, during the totalitarian regime, Russia and Germany have negated the principle of legality[16], in order to give more flexibility to fight against ,,enemies of the people".

The arguments that justify the principle of legality are as follows: separation of powers between the government branches; unfairness of punishment for the conduct, which was not prohibited at the time of its commission and therefore, was not foreseeable for the addressee; protection of the citizens from the arbitrary and discriminatory justice[17]. Therefore, criminal law bears a **guarantee function** for citizens[18].

According to the common interpretations, a number of prohibitions derive from the guarantee function, such as:[19]

- Prohibition of application of the customary norm (Lex scripta);
- Prohibition of analogy (Lex stricta);
- Prohibition of uncertainty of law (Lex certa);
- Prohibition of retroactive effect of law (Lex praevia).

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12 O. Gamkrelidze, Interpretations of the Criminal Code of Georgia, editor Merab Turava, 2nd revised edition Tbilisi: 2010), 78.

13 G. Nachkebia, Criminal Law – The General Part, Editor Irakli Dvalidze, (Tbilisi: Inovatsia, 2011), 83-84; M. Turava (2011), 108.

14 I. Vesels and V. Boelke, General Part of Criminal Law, Crime and its Constitution, editor Irakli Dvalidze, translator Zurab Arsenishvili (Tbilisi: Tbilisi University, 2010), 18; Shahram Dana, Beyond retroactivity to realizing justice: A theory on the principle of legality in international criminal law, Journal of Criminal Law and Criminology, Vol. 99, No. 4 (2009), 862; Schaack, (2008), 121-122.

15 S. Dana (2009), 862-863.

16 Allen Francis, 16; M. D. Dubber and T. Hornle (2014), 100.

17 John Calvin Jeffries, Jr., Legality, Vagueness, and the Construction of Penal Statutes, 71 Virginia Law Review 189 (1985), 201.

18 M.Turava (2011), 107.

19 S. Dana, 864-865; O. Pends (2010), 1945-1950, Central European History 43 (September 2010): 428-63; M. Faure and others (2013), 44-46; Beth Van Schaack, (2008), 121-122; M.Turava (2011), 109; I. Vesels and V. Boelke (2010), 18-22; M. D. Dubber and T. Hornle (2014), 73.

In addition to the above prohibitions, the Anglo-American criminal law doctrine provides for strict construction – the requirement that are directed to judges and means that in each case of vague legislation, out of many possibilities the law shall be interpreted in favor of the defendant.[20] We can say that this is more a stringent requirement than the prohibition of analogy of a ban but several studies have shown that it is rarely done in practice[21].

Based on the principle of legality, the above-mentioned prohibitions (Lex certa, Lex scripta, Lex stricta, Lex praevia) collectively serve the guarantee function of the law, which provides legal security for human beings. Precisely the certainty of law, the quality of its foreseeability and its availability was explained in light of the legal security by the Constitutional Court of Georgia (hereinafter the CC) and emphasized the importance of its protection[22]. Since this article aims to reveal one of the elements of the guarantee function of law – the legal certainty and to determine its essence in the modern reality, the next chapter will be devoted to research and analysis thereon.

THE PRINCIPLE OF *LEX CERTA*

One of the embodiment of criminal law guarantee function is the legal certainty principle or, as it is often referred to today, the requirement of "maximum certainty"[23], which means that the law must be a "reliable source"[24] for citizens and it should not cause their *post factum* fair surprise.[25] Demand that the norm shall be clearly formulated derives from the requirement of the constitutional significance that the norm addressees shall in advance have an idea about the prohibition in order to be able to "plan their actions"[26] and establish its compliance with the law.[27] This in turn is guarantor for their liberty[28] (in many countries where the death penalty is

20 J. C. Jeffries (1985)189; M. D. Dubber and T. Hornle (2014), 73.

21 Such a requirement has no formal basis in Georgia, also in Germany as noted by Dubber. See: M. D. Dubber and T. Hornle (2014), 100.

22 CC Ruling N1/3/407 dated 26 December 2007, II, 11; CC Ruling №1/2/503,513 dated 11 April 2013, II, 25.

23 Andrew Ashworth, Principles of Criminal Law, 6th ed. (New York: Oxford University Press, 2009), 58;

24 N. Gvenetadze and M. Turava, Decision-Making methods on Criminal Cases, editor: N. Dzidziguri, (Tbilisi, Association of Judges of Georgia, 2005), 33.

25 The term – fair surprise is used by Jeffries, see page 231; also by Herber Pecker, see page 53.

26 On the significance of *ex post facto* prohibition including in terms of certainty of the norm see: Weaver v. Graham: 450 U.S. 24 (1981); Giaccio v. Pennsylvania, 382 U.S. 399, 402 (1966); City of Chicago v. Morales, 527 U.S. 41, 58–59 (1999).

27 Explanations on importance of the legal certainty is provided by the Constitutional Court of Georgia as well. See the Ruling N2/2/389 date 26 October 2007.

28 The importance of the certainty of the norm was explained in light of the proportionality principle by the Constitutional Court of Georgia. See the Ruling N1/3/407 dated 26 December 2007, paragraphs 11-12.

still in force) and right of ownership, which will not be subject to arbitrary restriction by the state[29].

According to the explanations of the CC, the obligation of the legislator to make law foreseeable so that the addressee be able to adequately understand it derives from the principle of the state of law[30]. Ronald Dworkin thinks that a vague provision jeopardizes freedom, because individuals may assume the risk and take any step that might be prohibited by the norm or, conversely, to refuse to act on what is protected by the freedom guaranteed under the Constitution.[31]

It is correctly believed that the vague provision creates the danger of a seizure of power, which is damaging to the principle of the separation of powers. Vague provision allows the Court to create a new crime, which in turn creates the danger of oppressive and unjust justice.[32] It is a considerable thought that vague norm is a disrespect towards the citizen's autonomy, because the latter has the right to know in advance about the prohibition.[33] Vague norm creates threat in other areas as well; practice has repeatedly confirmed that such norms give impetus to discriminatory criminal policies and law enforcement[34].

A modern Georgian example[35] of unconstitutional uncertain provision is the composition of the conduct provided under Article 255 of the Criminal Code (Illegal making or sale of a pornographic work or other items) and conviction of an individual on the basis of this norm[36] in such a normative

29 Joel Samaha (2011), 41-42; Paul H. Robinson, Far warning and fair adjudication: two kinds of legality, University of Pennsylvania law review. Vol. 154 (2005), 359-360; Encyclopedia of crime and justice. 2nd ed. Vol 1. Ed. Joshua Dressler (New York: Macmillan Reference USA, 2002), 287; J. M. Scheb, (2009), 59. For different views please see: Peter K. Westen, Two Rules of Legality in Criminal Law, Law and Philosophy, Vol. 26, No. 3 (2007), 293.

30 See the Ruling N2/2/389 date 26 October 2007, paragraph 1; Ruling N 2/2/516,542 dated 14 May 2013 paragraphs 29-30.

31 R. Dworkin, Taking rights seriously (Delhi: Universal Law Publishing, 1999), 221. The similar view is expressed by Rawles. See: John Rawls, A Theory of Justice (Harvard University press, 1999), 210; Also see: T. J. Gardner and T. M. Anderson (2012), 19. In terms of significance of the legal certainty see: Meir Dan-Cohen, Decision rules and conduct rules, an acoustic separation in criminal law, Harvard Law Review, 97 (1983), 658-664.

32 R. Gosalbo-Bono (2010), 231.

33 A. Ashworth (2009), 75; Francis A. Allen (1996), 14.

34 P. H. Robinson (2005), 366; Jeffries, 218; S.H. Kadish, S.J. Schulhofer and C.S. Steiker, Criminal law and its process (New York: Aspen publisher, 2007), 161-164; John Rawls (1999), 211; Also see: Papachristou v. City of Jacksonville 405 U.S. 156 (1972).

35 The example for declaring the norm unconstitutional because of uncertainty in Georgian practice is the definition of espionage provided under Article 314 of the Criminal Code – the Constitutional Court recognized the phrase "or of the foreign organization" as unconstitutional. See the ruling of the Constitutional Court of Georgia N 2/2/516,542 dated 14 May 2013. For similarity see the case of State v. Metzger 319 N.W.2d 459 (Neb. 1982); For analysis see J. Samaha (2011), 44-45.

36 Ruling of Tbilisi City Court N 1/2684-15 (15 June 2015) and N1/2316-15 (14 May 2015). The Court in these cases did not talk about what was meant under illegality of spreading pornographic work and rendered a guilty judgment without providing any reasoning.

reality, where there is no regulation for issuance and sale of legally made pornographic work[37]. Under these conditions it is impossible to predict what the legislator meant with "illegal distribution" while it is silent with regard to the legality of the distribution. In such a case persons cannot be sure about the prohibition, nor will be able to organize their actions and in fear of not to commit the prohibited action may refrain from distribution of such information which is protected by the Constitution. There are numerous examples of vague norms in foreign countries' practice[38], among them **Rudy Stanko** case is noteworthy where a person was convicted on the basis of the rule prohibiting excessive speed driving on the highway. In order to denote the maximum speed limit the law applied such a vague definition as the **speed exceeding the reasonable limit, thus not setting clear limitations** for the addressee. The Supreme Court did not consider the norm as sufficiently certain norm and recognized it as unconstitutional. A good example for inevitably uncertain law was given in a case of **Ashlarba v. Georgia** (European Court of Human Rights)[39]. The applicant was accused of "membership of thieves' underworld", which was based on the Law on Organized Crime and Racketeering, Article 3, according to which the "thieves' underworld" is "any type of union of persons acting in accordance with special rules established/recognized by them...", while a member of the "thieves' underworld" is defined as "any person which recognizes the "thieves' underworld" and acts to achieve the aims of the thieves' underworld". According to the applicant, the norm was vague and lacked the foreseeability, which violated the principle of legality, according to which, the norm should be unambiguous and clear.[40] European Court of Human Rights, considering the historical background and the results of socio-legal research saw the wide nature of the mentioned norms in full compliance with the requirements of the legal certainty[41] and, therefore, no violation was found. Based on the studies the Court stated that "*this criminal phenomenon was already so deeply rooted in society, and the societal authority of "thieves in law" was so high, that among ordinary members of the public criminal concepts such as "thieves' underworld", "a thief in law", "settlement of disputes using the authority of a thief*

[37] On the compliance of the named norm with Article 42.5 of the Constitution please see the Constitutional Claim of Georgian Young Lawyers' Association N 657 (22 June 2015) and also Constitutional Claim by Giorgi Lolua N 711 (5 January 2016). Accessible at http://constcourt.ge/ge/court/sarchelebi, 26.05.2016.

[38] იხ. P. K. Westen, (2007), 249-250. Knuller v DPP, AC 435 House of Lords (1973); Shaw *v* DPP [1962] AC 220 57-60, 62, 468, 469. For the criticism of the named cases see: Ashworth (2009), 63 and Gabriel Hallevy, A Modern Treatise on the Principle of Legality in Criminal Law (Heidelberg: Springer-Heidelberg, 2010), 13. Compare: Jeffries (1985)189-246. On the prohibition of uncertainty of norm also see: T. J. Gardner and T. M. Anderson (2012), 22.

[39] Ashlarba v. Georgia N45554/08 (ECtHR: 15 October 2014); See the similar cases: Kokkinakis v. Greece N 14307/88 (ECtHR: 25 May 1993), para 40, 52; Also see: Steel and others v. The United Kingdom N 67/1997/851/1058, (ECtHR: 23 September 1998), პარ. 54, 55; Cantoni v. France N17862/91 (Strasbourg: 11 November 1996); Huhtamkai v. Finland, N 54468/09 (6 March 2012).

[40] Ashlarba v. Georgia, paragraphs 25 and 33.

[41] Ashlarba v. Georgia, paragraph 37.

in law", "obshyak", and so on, were matters of common knowledge and widely understood."[42] The Court explained that "*in any system of law, how clearly drafted a legal provision, including a criminal law provision, may be, there is an inevitable element of judicial interpretation.*"[43] There are cases where the Court used extremely dangerous interpretations in order to justify the eligibility of uncertain norms, as in the case of **Knuller**. The convicted published advertising in the British weekly magazine, where grown men were called to have sexual intercourse with him. This action was labeled as conspiracy that disrupted public morals and order by the Court of England. The convicted complained of qualification of the conduct as illegal, because the law on the basis of which he was convicted, in his opinion, was vague and did not allow him to act in compliance with it and therefore, in breach of the principle of legality. In that case the court interpreted its judgment as follows: "those who skate on thin ice can hardly expect to find a sign which will denote the precise spot where he [sic] will fall in".[44] According to the mentioned principle, the person who intends to commit a specific crime, the wide boundaries of which he/she has been warned of, should also be aware that the margin between the illegal and the legal actions is so small that it is expected to cross such margins in the early stages[45]. British scholar A. Ashworth disagrees with the "thin ice" principle because of its wide boundaries and considers that the Knuller case decided on the basis of this principle violated the principle of legality.[46] The "thin ice" principle is assessed to have unjustly broad interpretation and to be a simplified technique of proof for the penalization of the conduct by Hallevy,[47] but despite the significant criticism expressed in the juridical doctrine the "thin ice" principle continues its operation, mostly the fight against crimes that are determined by criminal-political aims.

There are numerous opinions expressed in criminal law doctrine as well as in the philosophy of law why a person should not be punished on the basis of an uncertain norm[48]. The main point where these opinions meet is that uncertain norm violated the principle of the separation of powers[49], also that vague norm does not provide advance notification of the prohibition, and the individual has the right to know exactly for what he/she will be punished and what type of punishment to

42 Ibid, paragraphs 36-37 and 40.
43 Ibid, paragraph 34.
44 Knuller v DPP, AC 435 House of Lords (1973).
45 A. Ashworth (2009), 63. For the different opinion on the same issue see: John Calvin Jeffries, Jr (1985), 189-246.
46 A. Ashworth (2009), 63.
47 G. Hallevy, (2010), 13.
48 J. Rawls (1999), 208-209; Trevor W. Morrison, Fair warning and retroactive judicial expansion of federal criminal statutes, South California law review, Vol. 74 (2001), 455-459; A. Ashworth (2009), 69-70; Michael Jefferson, Criminal law (Halow: Pearson, 2013), 5-8. For critical views on the vicious sides of the vague norms see: Douglas Husak, Criminal law theory, The Blackwell Guide to the Philosophy of Law and Legal Theory (Beckwell: 2005), 108-111.
49 R. Dworkin (1999) 221-222.

expect[50]. Punishing individual on the basis of such an ambiguous provision which may have a different understanding, is considered as wrong and unconstitutional.[51]

In determining the certainty of law European Court of Human Rights and national courts apply "the average intelligence quotient" which implies checking how the norm would be adequately understood by any of its addressee having average intelligence[52]. In addition, international[53] as well as national courts[54] are reluctant to use absolute definitions, for example: instead of applying the term "absolutely certain", they use "sufficiently certain" or "reasonably foreseeable" and etc. which is considered as enough for determination of constitutionality of the norm.

According to the Constitutional Court of Georgia, "the law can be considered uncertain when all the methods have been tested to understand it, but its actual content is still unclear or the essence is clear, but its scope is vague"[55]. In another judgment the Constitutional Court underlined the importance of understanding the will of the legislator in order to determine the scope of the norm. To clarify the content of the norm the importance of interpretation of the General Court was emphasized and it was also noted that the controversial practice can be the ground for recognition of the norm as unconstitutional[56]. However, it did not happen so, when the Constitutional Court was hearing a case on the constitutionality of the criminal law provision that had retroactive effect. In the mentioned case it was contested whether Lex praevia applied to the new law extending the limitation period and abolishing the conditional sentence[57]. Despite the fact that the disputed provision could not uniformly be interpreted in practice and the judgments of the General Courts were not uniform as well, the Constitutional Court[58] still did not declare the norm

50 Oliver Wendell Holmes, The path of the law, Harvard law review10 (1897)457.

51 R. Dworkin, 221.

52 United States Supreme Court in 1926 case (Connally v. General Construction Co N 324 (1926) and later in 1931 case explained the test "the average intelligence quotient test" in order to determine the extent of certainty of a norm(United States Supreme Court MCBOYLE v. U. S., N. 552 (1931). The mentioned case was cited in various other Rulings of the Court in order to deal with the analogical issue. For example see: United States v. Lanier, 520 U.S. 259 (1997); also see: United States v. Cardiff, N. 27 (1952); Papachristou v. City of Jacksonville 405 U.S. 156 (1972); Kolender v. Lawson, 461 U.S. 352 (1983); City of Chicago v. Morales, 527 U.S. 41 (1999).

53 Kokkinakis v. Greece, N 14307/88 (ECtHR: 25 May 1993), para 40 , 52; Steel and others v. The United Kingdom N 67/1997/851/1058, (Strasburg: 23 September 1998), para 54, 55; Ashlarba V. Georgia, N 45554/08 (Strasburg: 15 October 2014); The Sunday Times v. The United Kingdom, N6538/74 (ECtHR: 26 April 1976); S.W. v. The United Kingdom, N 20166/92 (ECtHR: 22 November 1995).

54 Grayned v. City of Rockford N 46 Ill.2d 492, 263 N.E.2d 866 (1972); Kolender v. Lawson, 461 U.S. 352 (1983).

55 Ruling of the Constitutional Court N 1/1/428,447,459 dated 13 May 2009, paragraph II-19.

56 Ruling of the Constitutional Court N 1/2/552 dated 4 March 2015, paras 16-17.

57 Ruling of the Constitutional Court N 1/1/428,447,459 dated 13 May, 2009.

58 Ruling of the Constitutional Court dated 14 May 2013, para 36.

unconstitutional[59]. In another case, the Constitutional Court in order to determine the certainty of the norm attached importance to the objective borders of its interpretation. If the latter cannot be read in the provision, and it is subjective, which gives liberty to the law enforcers, such a provision is not considered to be sufficiently certain. In 2013, several items of espionage under the Criminal Code, in terms of compliance with the Constitution, has become a subject of discussion, including the applicant's claims – collecting or transferring foreign intelligence or other information to the detriment of the interests of Georgia – was not a reliable source of information, and thus it was a case of unconstitutional uncertainty. The Constitutional Court considered "collecting the other information" as sufficiently foreseeable, inasmuch as it is seen not in isolation, but in conjunction with "an act carried out under the order of foreign intelligence to the detriment of the interests of Georgia". The Constitutional Court also drew attention to the subjective composition of the act and considered that the boundaries of its objective sides in relation to "other information" and the subjective composition were sufficient to understand the norm[60]. The composition of espionage, which is in the chapter of crimes against the constitutional order and security of Georgia, of course, should be seen in light of threatening these universal good. Therefore, a rather general definition of the "other information" which is collected in order to damage the protected good, is in compliance with the Lex certa requirement and this was correctly referred by the Court. The prohibition norm was not reasonably interpreted, for example, in the case of *People v. Page*[61] – the case where a person was punished for the assault using the "dangerous weapon", while the accused used an edgy pencil as an instrument of assault. The dispute was about whether the pencil was in line with legislative definition of a "dangerous weapon" which was a qualifying circumstance. The court ignored the fact that "danger" is an imminent characteristic for such abstract threat action/aggravating circumstances, which is why they are criminalized as an abstract endangerment delict. **The danger is within the idea**[62]. For example, such an inherent sign is danger for firearms, but not for a pencil, which has a different function. Thus, we can say that in the case of California, the court ignored the objective of the norm's boundaries.

Thus, the prohibition of the application of a vague norm, which is meant under the *nullum crimen sine lege* principle[63], as the above analysis showed, does not imply absolute transparency, on

[59] See the separate opinion by Judge K. Eremadze on the Ruling N 1/1/428,447,459 dated 13 May 2009. On the same issue see D. Sulakvelidze, On the Retroactive Effect of Criminal Law Provision – Commentary to the Ruling of the Constitutional Court of Georgia and K. Eremadze, Answer to the Commentary by D. Sulakvelidze, Constitutional Court Law Review, N2 (2010).

[60] Ruling of the Constitutional Court of Georgia N 2/2/516,542 dated 14 May, paras 34-35.

[61] People v. Page 123 Cal. App. 4th 1466, 20 Cal. Rptr. 3d 857 (2004).

[62] N.Todua, Threat-creating Offenses according to the Criminal Code of Georgia, Justice and Law, N2-3 (2007), 153-156.

[63] J. Rawls (1999), 209.

which most scientists would agree, because for the norm, which is written in a normal language, uncertainty to a more or less extent is immanent[64]. H. Hart's position should also be shared that the world we live in, does not stand out with clarity, where all possible situations would fall within any foreseeable form; for such construction of the world the "mechanical jurisprudence" would be the most suitable, where everything is calculated and considered in advance[65]. According to the author, from the fact that the world is so diverse and the human imagination in understanding it – limited, the law is the way it is and in such a reality the general provisions are acceptable and inevitable. He also says that the uncertainty of the norm is the price to be paid upon the adoption of provisions of general character[66]. According to Hart, even the most certain norm has its own "penumbra" which, sooner or later, may arise in some situations. In order to overcome uncertainty it is important to correctly determine the objective of the norm, but he also adds that together with the social development a once-detected aim might need to be reconsidered[67]. According to R.H. Fallon, "aim" cannot be understood in isolation of the existing cultural and social life; it is not a historical fact, which has not changed and is waiting to be detected by any diligent researcher, but it is very complex and multifaceted concept that needs to be modified along with the change of time.[68] The dual nature of general provisions the so-called general clauses is discussed in the Georgian law literature, which on the one hand is considered as threat to the principle of separation of powers while on the other hand its useful nature is shown in terms of adjustment with the development of law and modern challenges[69]. According to J. Jeffries only then is the judicial interpretation of the norm an appropriation of the legislative authority, when it is done so against the clear will of the legislature, and when the norm cannot be understood and is not certain, its interpretation is "necessary" and the "inevitable" as well. Such an interpretation is called the "institutional function" of the court by the author[70]. Husak as well is not against the general definition. In his view, a general definition can be as wide as it is necessary to achieve the

64 There are lawyers who are for the admissibility of uncertain norm as well as lawyers for its strict (for example Ashworth) and more liberal interpretation (for example Jeffries and Westen) A. Ashworth (2009). Compare: P. K. Westen (2007), 276, footnote 80.

65 H.L.A.Hart, The Concept of Law (Oxford: Clarendon Press, 1982), 123-125. The same view is expressed by United States Supreme Court in a case of Grayned v. City of Rockford N 46 Ill.2d 492, 263 N.E.2d 866 (1972), where the court notes that the norm which is expressed with human language, cannot be mathematically precise, moreover, in a world which can not be recognized to the very end since the human imagination is limited. The referred decision is cited by Samaha, see: (2011), 43.

66 H.L.A.Hart, 125

67 Ibid. 112; The same view is shared by Robinson. See: P. Robinson (2005), 357.

68 R.H. Fallon, (1997), 13-14. Compare: Antonin Scalia, The Rule of Law as a Law of Rules, The University of Chicago Law Review Vol. 56, No. 4 (Autumn, 1989), 1183-1187.

69 Gvenetadze and Turava (2005), 32-34.

70 J.C. Jeffries (1985) 204-205; In Khubua's view, for the regulation of complicated and varied social relations the definition of the norm is acceptable and it is becoming increasingly important. See: Khubua, (2004), 152.

objective for which the conduct was criminalized and this should be the only means of achieving a legitimate aim[71]. As discussed above, the courts including European Court of Human Rights have several times explained that the so called general clauses per se momentum do not represent provisions unconstitutionally restricting the human rights and they can be "inevitably unclear". Fletcher's view is significant as well according to which the law does not have to become like fundamentalist understanding of a religious doctrine which does not looks towards the future and offers the norm that is understood once and for all. According to him, a lawyer resembles the religious fundamentalists which sacralizes law, creates something inalienable from it and exclude its understanding with momentum of the universal justice system qualified[72]. We can say that with respect to the allowed and disallowed ambiguity of the norm similar opinions are expressed in both Georgian and foreign academic circles and the judicial practice, some of which are characterized with more and some with less flexibility, but so it happens, that the norm is so uncertain that not fit any of the criteria referred to above but still continues its operation, which is, of course, is not a good example. Considering the criminal-political goals the agreed criteria expands even more and, therefore in order to assess "certainty" the further low standard is introduced. An example is the conspiracy which is criminalized under the legislation of the Anglo-American and some Continental European countries (Germany, Spain). Conspiracy is when two or more persons agree to commit an offense[73]. Therefore, for the conduct to be qualified as conspiracy a mere agreement to commit a crime without any further action is sufficient. According to the opponents of conspiracy in addition to the fact that criminalization of conspiracy is unjustified interference in the human freedom, it also fails to meet the foreseeability tests of the law, which leaves the prosecution with more opportunity of abuse[74]. Argument on uncertainty of conspiracy definition is directed to "agreement", what is meant under the agreement of two or more persons, and to illustrate the claim Dr. Benjamin Spock-'s case is recalled, where the pediatrician was charged with propaganda against the Vietnam War. The videotape, which was recorded during Benjamin's speech, showed applauses and ovations of hundreds of supporters. According to the prosecutor, all those people, who declared his support with the applause, had to be punished for conspiracy with Benjamin[75]. 1939 case[76] is recalled in the same context, in which 8 distributors of a motion

71 Douglas Husak, Overcriminalization – The Limits of The Criminal Law, (Oxford & NewYork: Oxford University Press, 2008),168.

72 George P. Fletcher, Basic Concepts of Criminal Law (New York: Oxford University press, 1998), 211

73 J. Samaha (2011), 259; Richard G. Singer & John Q. La Fonda, Criminal law – Examples and Explanations, Fifth edition (NewYork: Aspen Publishers, 2010), 340: Mike Molan, Duncan Bloy & Denis Lanser, Modern Criminal Law, 5th edition (London: Cavendish, 2003), 142; David Ormerod, Smith and Hogan Criminal Law: Cases and Materials, 10th edition (Oxford & New York: Oxford University Press, 2009), 536.

74 J. Samaha (2011), 259. R.G.Singer & J. Q. La Fond (2010), 340.

75 J. Samaha, Ibid; David B. Filvarofft, Conspiracy and the first amendment, University of Pennsylvania Law Review 2, vol. 121 (December 1972),190.

76 Interstate Circuit Inc. v. United States, 306 U.S. 208 (1939).

picture were held responsible for the conspiracy. In the named case the court viewed people's silence on the proposal to commit a crime as "agreement"[77]. The supporters of criminalizing conspiracy justify its need with modern challenges and high public interest reasons.

Despite the fair criticism of conspiracy, it still continues to operate and as the statistics show, is the most often punishable "act"[78] and especially powerful weapon in the fight against terrorism, white-collar crime and drug crimes[79]. In order to criticize the wide borders of conspiracy it is enough to mention that it is disclosed, as a rule, after the crime, to which the agreement was directed, takes place and the person is tried for two crimes – conspiracy and the crime towards which the agreement was directed[80]. Hence, the "legitimate aim" of the state to prevent particularly dangerous act at early stage of its detection cannot be reached and the conspiracy is used for other purposes[81]. Similar criticism goes to another type of an unfinished crime, in particular, the offense of incitement to commit a crime (solicitation), which is reflected in a futile attempt[82] to persuade the other person to commit a crime – with the promise, threat, order or other means[83], and this crime is finished from the moment the incitement is delivered[84]. In the 19th century, American courts have criticized the solicitation. The person was charged with one's futile abetting to commit adultery[85]; According to the judge in the named case, if a solicitation is an offense, then „... just nodding or winking to a married person" should be considered as a crime, which unjustifiably increases the scope of liability and also unjustifiably restricts human freedom[86]. Namely because of human freedom primacy and uncertainty of the prohibited act argument in various States of the US solicitation is not a punishable act[87]. However, it should be noted that in practice, according to studies, in some States of the US where the crime of

77 Encyclopedia of Crime and Justice, vol.1 (2002), 241-242.

78 R.G. Singer & J. Q. La Fond (2010), 340. 1st footnote.

79 Juliet R.A. Okoth, The Crime of Conspiracy in International Criminal Law (Kenya: T.M.C. Asser Press, May 13, 2014), 25.

80 Callanan v. United States, 364 U.S. 587 (1961); On this issue see: R.G.Singer & J. Q. La Fond (2010), 342. The same rule operates in England. See: Ruling of the Court of England in a case of DPP v. Stewart, 1982, 3 W.R.L. 884. On this issue also see: A. Ashworth (2009), 450-451; Julia Okoth, 21-23.

81 A number of studies have shown that mechanisms of punishment for both crimes is of principal importance, since it is a powerful weapon in the the hands of prosecution. If the prosecution fails to provide reasoning to the very end for the charges against the finished crimes, conspiracy will still remain a trump card. Thus, there are a series of procedural discounts provided for the charges of conspiracy, which has been successfully used in practice. For example, if as a general rule, the prosecution cannot establish the accusation on indirect testimony as it lacks confidence in the quality, which is generally required for evidence, such is admitted with respect to conspiracy. See: R.G. Singer & J. Q. La Fond (2010), 344-345; Encyclopedia of crime and justice, vol.1 (2002), 242; CMV Clarkson, HM Keating & SR Cunningham, Clarkson and Keating Criminal Law: text and materials, 6th edition (London: Thomson, 2007), 517, footnote 101. D. Ormerod, (2009), 534; J. Samaha (2011), 264.

82 J. Samaha (2011), 265

83 Race Relations Board v Applin, 1 Q.B.815, 825 (1973).

84 R.G. Singer & J. Q. La Fond (2010), 296-297; CMV Clarkson, HM Keating & SR Cunningham (2007), 534-535.

85 Even today in various States of the US marital infidelity is punishable under the criminal law.

86 Mathew Lippman, Contemporary Criminal Law: Concepts, cases, and controversies, second edition (California: Sage, 2010), 208. Also see the case of State v Butler, 8 Wash. 194; 35 P. 1093 (1894).

87 M. Lippman (2010), 208.

unsuccessful incitement is not punishable, for the criminal-political goals, the attempted crime is broadly interpreted and what in its nature does not exceed futile encouragement has proximity been qualified as an attempt to commit a crime[88]. In order to justify the above mentioned crimes even the "thin ice skating principle" cannot be applied because despite the broad interpretation, it is limited to crimes of particular social danger suppressing of which at a very early stage is explained with the objective need and warns the addressee in advance; as far as conspiracy and incitement to commit a crime is directed to all categories of crimes[89], it turns into not special, but rather the general rule, which unduly limits the autonomy of the person. Similar criticism goes to Article 18 of the Criminal Code of Georgia which criminalizes preparation of crime, however, despite the fact the "deliberate creation of conditions" for crime which is the legislative term for the preparation is rather a general definition, but given that the practice has shown the trend of interpretation[90] of its proximity with the attempt to commit a crime and the same idea is expressed in understanding the nature of the crime of criminal dogmatism[91], the general definition of crime preparation has to be justified in light of the diversity of the environment we live in.

Thus, it can be said that *Lex certa* provision does not imply formulation of the norm for casus-specific necessity. It covers the general definitions of norms the need of which is explain by life's diversity and the need to adapt the law to it. However, unequivocal answer to the question of where the line runs between the allowed and forbidden general compositions of crime does not exist because there is no mathematical formula that would solve all problems without checking first. However, it is also clear-cut that the absolute certainty of the norm is not achievable and the guarantee function of criminal law does not imply such an absolute provision but rather a sufficient foreseeability is meant under it. Shedding the provision to light and its correct application significantly depends upon the exact understanding of its purpose and also to on the norm's content. Also the provision can be considered as unconstitutionally vague which cannot be understood correctly, for which no tangible definition is found, that would help "the average reasonable person", even after the legal consultation, to adequately understand the norm, learn its scope. A number of such a vague definitions were cited in this article, and, among others is the composition of the crime provided in Article 255 of the Criminal Code the elements of which will soon become the subject of evaluation.

88 Ward v. State, 528 N.E. 2d (Ind. 1988).

89 D. Ormerod, 531; J. Samaha, 264 და 266-267; A. Ashworth (2009), 454. R.G. Singer & J. Q. La Fond (2010), 341. Some States are exception, for example in Kansas, Michigan and Colorado States incitement to fruitless felony is punishable. See: M. Lipmann (2010), 207. In Germany conspiracy is punishable only in the case if a penalty for the major offense is a minimum one-year sentence. See: J. Okoth (2014), 49.

90 See the Ruling N1-90-14 of Rustavi City Court Criminal Cases' Collegium ბბ. (10 October 2014); Judgment N1-92-11 of Rustavi City Court Criminal Cases' Collegium (7 June 2011); Tbilisi City Court Criminal Cases' Collegium Judgment N1/2045-12 (7 May 2012). For analysis see: Tamar Gegelia, Punishability of General Preparation of Crime (Comparative Legal Analysis), South Caucasus Law Journal N6 (2015), 169-180.

91 T. Tsereteli, Preparation and Attempt of Crime (Tbilisi, Georgian SSR Academy of Science, 1961), 88; O. Gamkrelidze (2010), 158-159; Ketevan Mchedlishvili – Hedrich, Punishability of Crime Preparation in Georgian Criminal Law in light of German Scholarly on Attempted Crime, Criminal Law Science in Single European Development Process, Criminal Law Science Symposium Collection 1, editor M. Turava (Tbilisi, 2013) 94.