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The Principle of Legality

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ABSTRACT: The principle of legality, in criminal law, means that only the law can define a crime and prescribe a penalty (*nullum crimen, nulla poena sine lege*). It also embodies, that the criminal law must not be extensively interpreted to an accused′s detriment, for instance by analogy. According to that principle, an offence must be clearly defined in the law. The concept of law comprises written as well as unwritten law and implies qualitative requirements, notably those of accessibility and foreseeability. The requirements are satisfied where the individual can now from the wording of the relevant provision and, if need be, with the assistance of courts′ interpretation of it, what acts and omissions will make him criminally liable. The principle of legality also includes the rule which prohibit the retrospective application of the criminal law to an accused′s disadvantage. That principle is enshrined in the constitutions of many countries as well as in the most important international convention that protects human rights.

KEYWORDS: accessibility, criminal law, foreseeability, legality, retrospective application

General aspects

The idea of legality in criminal law appeared in the 17th century, being promoted by the illuminism representatives as Beccaria, Voltaire, Rousseau, Diderot, and was enshrined for the first time in the Prussian Penal Code. It also was mentioned by the Independence Declaration of United States (US 1776) and Declaration of the Rights of Man and Citizen, France (1789).

After de second world war, many states agreed to adopt The Charter of the United Nations, in witch is enshrined as a purpose to achieve international co-operation in order to solve problems of an economic, social, cultural, or humanitarian character, and to promote and encourage respect for human rights and for fundamental freedoms for all. Three years later, the Universal Declaration of Human Rights (1948) was proclaimed by the United Nations General Assembly, Paris 10 December 1948. According to article 11, "No one shall be held guilty of any penal offence on account of any or omission which did not constitute a penal offence, under national or international law, at the time when it was committed, Nor shall a heavier penalty be imposed that the one that was applicable at the time the penal offence was committed."

Later, the United Nations adopted the International Covenant on Civil and Political Rights (1966) which provides in the Article 15 "No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, offender shall benefit thereby".

Beside the worldwide international treaties, regional conventions on human rights protection were adopted. One of the most important international treaty in this area was the Convention for the Protection of Human Rights and Fundamental Freedoms (1950). This was the first convention to give effect to most of the rights enshrined in the Universal Declaration of Human Rights and make them binding. In this Convention, is stated in the Article 7 *"No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed."*

Regional conventions on human rights protection with similar provision were adopted in American or African Continents. For instance, in American Convention on Human Rights (OAS 1969), Article 9 states: "Freedom from Ex Post Facto Laws" it is stated that No one shall be convicted of any act or omission that did not constitute a criminal offence, under the applicable law, at the time

it was committed. A heavier penalty shall not be imposed that the one that was applicable at the time the criminal offence was committed. If subsequent to the commission of the offence the provides for the imposition of a lighter punishment, the guilty person shall benefit therefrom.

In African (BANJUL) Charter on Human Rights and Peoples′ Rights (OAU 1981), Article 7 paragraph 2, provides, "No one may be condemned for an act or omission which did not constitute a legally punishable offence at the time it was committed. No penalty may be inflected for an offence for which no provision was made at the time it was committed. Punishment is personal and can be imposed only on the offender".

The components of the Principle of Legality

The principle of legality in criminal law was seemed as a guarantee of freedoms and rights of the citizens and it supposed to maintain the rule of law.

This principle comprises several rules. First of all, is that the criminal offences and the penalties must be provided by law, as an act adopted by the Parliament, and could not be provided by the inferior acts, as those adopted by the Government, Ministers and other national institutions (*nullum crimen sine lege; nula poena sine lege*). The second rule is that the criminal law must be very well determined, which means that it must be worded in clear and specific terms, and also must be foreseeable (*nullum crimen sine lege certa*).

Also, the principle of legality includes that the criminal law, which provides an act or an omission as a criminal offence, must be adopted and brought into force before committing the crime (*nullum crimen sine lege praevia*).

1. *Nullum crimen sine lege; nulla poena sine lege*

This rules means that only the law can define a crime and described a penalty, and, mainly, is viewed as an act adopted by the legislator of any state. Anyway, the concept of "law" refers to written as well as unwritten law and implies qualitative requirements, especially those of accessibility and foreseeability. The accessibility requires that any person must have the possibility to be informed about the existing criminal laws, that includes the obligation of the state to make it public in any way.

2. *Nullum crimen sine lege certa; nullum crimen sine lege stricta*

According to this principle an offence must be clearly defined in the law and this must be foreseeable for any person. The requirement is satisfied where a person can know the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it, what act or omission will make him criminally liable. But a consequence of the principle that laws must be of general application is that the wording of the statues is not always precise.

One of the standard techniques of regulation by rules is to use general categorisations as opposed to exhaustive lists. The need to avoid the excessive rigidity and to keep pace with changing realities means that many laws use inevitably the terms which, to a greater or lesser extent, are vague. In this case, the interpretation and application of such acts depends on practice.

The Inter-American Court of Human Rights stated in its jurisprudence that the principle of legality according to which "no one shall be convicted of any act or omission that din not constitute a criminal offence at the time it was committed" (Article 9 of the American Convention) constitutes a central element of criminal prosecution in a democratic society. The classification of an act as illegal and the establishment of its effects must pre-exist the action of the person who is considered the wrongdoer because, otherwise, the individual would be unable to adapt their actions to a legal order in force and certain that expresses social condemnation and the consequences of this (Case Baena Ricardo et al. v. Panama).

The classification of offences requires a clear definition of the criminalized act that establishes its elements and allows it to be distinguished from acts that are no penalized or illegal acts that may be punished by non-criminal measures (Case Castillo Petruzzi et. al v. Peru). The sphere of application of each offence must previously be delimited as clearly and precisely as possible (Case Fermin Ramirez v. Guatemala), in an explicit and precis manner.

When defining offences of a terrorist nature, the principle of legality requires that a necessary distinction be made between such offences and ordinary offences so that every individual and also the criminal judge have sufficient legal elements to know whether an action is penalized under one or the other offence. This is especially important with regard to terrorist offences because they merit harsher prison sentences, and ancillary penalties and disqualifications with major effects on the exercise of other fundamental rights are usually established – as in Law No. 18, 314. In addition, the investigation of terrorist offences has procedural consequences that, in the case of Chile, may include the restriction of certain rights during the investigation and prosecution stages.

Having to solve a case (Case Norin Catriman et al. v. Chile), the Court considered that the presumption that the intent exists when certain objective elements exist (including ”the fact of committing an offence with explosive or incendiary devices”) violates the principle of legality established in Article 9 of this Convention (American Convention on Human Rights, ”Pact of San Jose, Costa Rica”).

The notion of foreseeability depends to a considerable degree on the content of the text on issue, the field it is designed to cover and the number and status of those to whom it is addressed.

A law may still satisfy the requirement of foreseeability even if the person concerned has to take appropriate legal advice to asses, to a degree that is reasonable in the circumstances, the consequences which a given action may imply. This is the situation of the person carrying out on a professional activity, who are used to having to proceed with a high degree of caution when pursuing their occupation. They can on this account be expected to take special care in assessing the risks that such activity implies.

Having to analyse this requirement in a case, the European Court of the Human Rights, stated, that: “From, at latest, 1957 onwards the Court of Cassation has always either confirmed the decision of the courts below classifying a pharmaceutical-type product as medicinal or quashed decision by a lower court finding that such a product fell outside the notion of medicinal product. Thus, well before the events in the present case, the court of Cassation had adopted a clear position on this matter, which with the passing time became even more firmly established”.

In this case, the European Court concluded that with the benefit of appropriate legal advice, the applicant, who was, moreover, the manager of a supermarket, should have appreciated at the material time that, in view of the line of case-law stemming from the Court of Cassation and from some of the lower courts, he ran a real risk of prosecution for unlawful sale of medicinal product.

Finally, the European Court stated that there was no breach of Article 7 (Case Cantoni v. France). On the other hand, clearly drafted a legal provision may be, in any system of law, including criminal law, there is an inevitable element of judicial interpretation. There will always be a need for elucidation of doubtful points and for adaptation of changing circumstances. Indeed, in any country the progressive development of the criminal law through judicial law-making is a well consolidated and necessary part of legal tradition.

This principle cannot be understood as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen.

Having to solve a case, the European Court of Human Rights, stated: ”The essentially debating character of rape is so manifest that the result of the decisions of the Court of Appeal and House of Lords – that the applicant could be convicted of attempted rape, irrespective of his relationship with the victim – cannot be said to be at variance with the object and purpose of Article 7 of the Convention (European Convention of Human Rights), namely to ensure that no one should be subjected to arbitrary prosecution, conviction or punishment. What is more, the abandonment of the unacceptable idea of a husband being immune against prosecution of rape of his wife was in conformity not only with a civilized concept of marriage but also, and above all, with the fundamental objectives of the Convention, the very essence of which is respect for human dignity and human freedom.

Having reached to this conclusion, the Court does not find it necessary to enquire into whether the facts in the applicant′ case were covered by the exceptions to the immunity rule already made by

the English courts before 12 November 1989. In short, the Court found that the national courts′ decisions that the applicant could not invoke immunity to escape conviction and sentence for attempted rape his wife did not give rise to a violation of his rights under Article 7 para. 1 of the Convention" (Case C.R. v. The United Kingdom).

In other case, the European Court recalled that Article 7 of the Convention requires offences to be "clearly defined in law". That condition is satisfied where the individual can know from the wording of the relevant provision and, if need be, with the assistance of the courts′ interpretation of it, what acts and omissions will make him liable.

In this case the Court noted that: "It is true that, in the context of audiovisual communication, the words - *fixed prior to being communicated to the public* – may seem to indicate that a publishing director cannot be convicted of an offence under section 93-3 pf the 1982 Act unless the offending statement has been recorded before being broadcast. Thus construed, section 93-3 cannot form the basis for the successful prosecution of a publishing director where the *statement* had been broadcasted live. The Court notes moreover that the Government have not supplied any evidence that before the applicants′ trial the domestic courts had applied section 93-3 in circumstances similar to those of the present case". (The applicants complained that the criminal law had been extensively applied in that when finding that "the content of the offending statement [had been] fixed prior to being communicated to the public" despite the fact that all the news bulletins and flashes concerned had been broadcast live, the domestic courts had based their finding of the second and third applicants' criminal responsibility on an interpretation by analogy of section 93-3 of the Audiovisual Communication Act (Law no 82-652 of 29 July 1982 – "the 1982 Act"). They relied on Article 7 § 1 of the Convention).

In the reasoning of its decision, the European Court noted that "the presumption of the publishing director′s responsibility established by section 93-3 of the 1982 Act is the corollary of the latter′s duty to check the content of the statement put out through the medium for which he works. The reason, therefore, why the publishing director′s responsibility is engaged only where the content of the offending *statement* has been *fixed* prior to being broadcast is that he is deemed on account of that *prior fixing* to have been placed to apprise himself of its content and check it before it is broadcast.

Moreover, it is clear – and parties did not disagree on this point – that there has been *prior fixing* where the offending *statement* has been recorded with a view to its being broadcast, and that, conversely, there has been no *prior fixing* where such a statement has been broadcast live. In the Court′s opinion, the facts of the present case fall halfway between recording and live broadcasting. On the one hand, the offending statement was not recorded; on the other, in view of the way France Info operated, it was intended to be repeated live-to-air at regular intervals. As there had been no *prior fixing*, the criminal courts absolved the publishing director of all responsibility in respect of the first of the bulletins broadcast on France Info; on the other hand, they held that that first broadcast had constituted a *prior fixing* of the statement′s content as regards subsequent broadcasts. They therefore ruled that from the second broadcast onwards the publishing director could be considered to have been placed in to check its content beforehand. The Court considers that, in the particular context of the way France info operated, that interpretation of the concept *prior fixing* was consistent with the essence of the offence concerned and *reasonably foreseeable.*" Therefore, the European Court concluded there had been no violation of article 7 of the Convention (Case Radio France and Others v. France Judgment).

3. *Nullum crimen sine lege praevia*

This rule states that no one can be convicted for an act or omission that did not constitute an offence at the time it was committed. The fundament of this rule is that a criminal law must prevent committing the criminal offence, before fighting against them. According to this principle it is prohibited to apply retrospectively the criminal law to an accused′s disadvantage.

Following this principle, enshrined in Article 7 of the European Convention of Human Rights, in a case, the European Court concluded that there was a violation of this article in which the criminal act was a continuing offence. In this case, the European Court found that: ”The applicant was convicted under Article 148-1 & 7 of the Criminal Code, as worded since 13 January 1995, of tax offences which were committed in the period from 1993 to 1996.

It observes that the application of the criminal law of 13 January 1995 to subsequent acts is not at issue in the instant case. The question to be determined is whether the extension of the law to acts committed prior to that date infringed the guarantee set forth in Article 7 of the Convention. The Court also, notes that, according to the text of Article 148-1 of the Criminal Code before its amendment in 1995, a person could be held criminally liable for tax evasion only *if an administrative penalty had been imposed on him or her a similar offence*. The condition was thus an element of the offence of the tax evasion without which a criminal conviction could not follow.

It further observes that a considerable number of acts of which the applicant was convicted took place exclusively within the period prior to January 1995. The sentence imposed on the applicant – a suspended term of three years and six months′ imprisonment – took into account acts committed both before and after January 1995.

In these circumstances, the court finds that the domestic courts applied the 1995 amendment to the law retrospectively to behaviour which did not previously constitute a criminal offence” (Case Veeber v. Estonia). According to the principle *nullum crimen sine lege praevia*, as we already mentioned, no one can be subjected to a criminal penalty heavier that the one provided at the time when the offence was committed. On this matter, the European Court decided that there was a violation of Article 7, in a case in which the defendant faced much more sever treatment than those provide by law at the time that was committed. There is an exception from this rule, when the retrospective application of criminal law is permitted, in case of law that contain favourable provisions (*mitior lex*).

In this matter, the European Court of Human Rights, stated that ”the offences of which the applicant was accused fell within the scope of the formal Article 332 and 333 of the Criminal Code, which satisfied the requirements of foreseeability and accessibility. There was a consistent case-law from the Court of Cassation, which was published and therefore accessible, on the notions of violence and abuse of authority. As regards the notion of violence, the new provisions in the Articles 332 and 333 of the criminal Code merely confirmed this case-law.

The court notes that the acts of which the applicant was accused also fell within the scope of the new legislation. On the basis of the principle that the more lenient law should apply both as regards the definition of the offence and the sanctions imposed, the national courts applied the new Article 333 of the Criminal Code for the imposition of sanctions as that provision downgraded the offence of which Mr. G. was accused from serious offence (crime) to less serious offence (delit). Its application, admittedly retrospective, therefore operated in the applicant′s favour” (Case G. v. France).

The Court concluded, in the case above mentioned, that there had been no violation of Article 7 para. 1 of the European Convention of Human Rights.

On this area, the African Court on Human and Peoples′ Rights stated in a case: ”It is therefore evident that the application of the 2012 Penal code and Law No. 84/2013 on the Applicant was in general favourable and is congruent with the exception to the rule of non-retroactivity, that new criminal laws may be applied to acts committed before their commission when these laws provide lighter punishment. The fact that the punishment imposed on the Applicant by the High Court was higher that the penalty that was initially imposed by the High court was not because of the retrospective application of the new laws. As the record before this Court reveal, this was rather because the Supreme Court had rejected the mitigating circumstances considered by the High Court, and convicted the Applicant for an offence for which she had been acquitted by the High Court. This in itself is not a violation of the principle of non-retroactivity of criminal law” (Case Ingabire Victoire Umuhoza v. Rwanda).

Conclusions

The principle of legality is considered a guarantee against the arbitrary application of the criminal law, and is also viewed as an essential element of the rule of law. This is why this principle occupies a prominent place in any international convention on human rights, as we have already mentioned.

For instance, in the European system of human rights protection, this principle is considered to belong to the hard core of the European Convention on Human Rights. An argument of this is that the Article 15 of the Convention – Derogation in time of emergency – provides: In time of the war or other emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law. But, no derogation from Article 7, *inter alia*, shall be made under this provision.

Finally, is to mention that the Constitutional Acts and Criminal Codes of any modern state have enshrined the principle of legality, as one of the most important in their legal system, and a guarantee against the violation of human rights. Following that, there are provisions in the domestic law that could sanction any violation of this principle, and after exhausted all internal appeal, any person who was a victim of a violation like this could log an application before de international courts.

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