



THE EXTENT OF INTERVENTION BY THE CRIMINAL JUDGE WITHIN THE SCOPE OF APPLYING THE PRINCIPLE OF LEGITIMACY OF CRIMES AND PENALTIES

Dr. TEBBOUNE Abdelkrim

University of SAIDA Dr Moulay Tahar (Algeria), E-mail: abdelkrim.tebboune@univ-saida.dz

Received: 03/2024, Published: 07/2024

Abstract:

Law is a set of rules characterized by generality and abstraction, binding upon those addressed by it. It organizes society, legislated by lawmaker and interpreted by judge.

Given the severity of criminal law rules, which include punitive measures up to imprisonment, it is necessary to establish limits on judicial intervention under what is known as the principle of legality of crimes and punishments.

This study aims to highlight these limits.

Keywords: Judge - Principle of legality - Crimes - Punishments - Interpretation - Scope - Judicial discretion.

INTRODUCTION:

Among the objectives of criminal law is to ensure the protection of society in general from all the dangers perceived by the legislator within its criminal policy. In doing so, it effectively safeguards the exercise of individuals' rights and freedoms, aiming to achieve the public interest in its broadest sense. Thus, it constitutes a significant guarantee for the preservation of the rights and freedoms of individuals. Perhaps it is the strongest legal guarantee, considering the distinctiveness of this important branch of law, with its principles encompassing the criminalization of actions and the determination of appropriate penalties for them.

Considering the importance of the process of criminalization and its implications in terms of punishment and the associated highly significant issues within the framework of a fundamental principle represented by the legitimacy of crimes and penalties, it was imperative to precisely and explicitly define the legal rules of a penal nature in a manner that eliminates ambiguity. This definition should be based on written legal principles that do not allow for interpretation or analogy.

However, it may not always be the case that legal provision, particularly in criminal law, are entirely clear. They may require interpretation, which is exclusively the responsibility of the judge. The process of interpretation holds significant importance, as emphasized by jurisprudence and reiterated by some scholars: "The importance of interpretation becomes evident concerning criminal provision that contain legal provisions primarily stemming from the legislator's will expressed through legal discourse. These are legal texts directed at law enforcers, namely judges, to embody this will."¹

Therefore, the issue arises regarding the extent of the intervention of the criminal judge, who is governed by the principle of the legitimacy of crimes and punishments, in explaining the provisions and rules of a penal nature. Additionally, a subsidiary issue arises concerning the extent to which the law is considered the sole source of criminalization and punishment, and the consequences thereof, as well as the limits of the judge's interpretation of the criminal provision.

In order to address this issue, a descriptive approach was adopted, which involved providing a knowledgeable description to arrive at scientific interpretations of the content of the rules under

¹ Professor Athamnia Lakhamissi, Interpretation in Criminal Law and Its Impact on Legislative Movement, Judicial Ijtihad Journal, Volume 01, Issue 01, 2004, pp. 43-64, p. 44.



study. Additionally, an analytical approach was employed to assess the value and content of these rules.

Accordingly, the topic will be divided into two sections: the first one will consider the law as the sole source of criminalization and punishment, along with its legal consequences. The second section will focus on studying the interpretation of the rules of criminalization and punishment.

Firstly: Considering the law as the sole source of criminalization and punishment and the legal consequences thereof

The principle of the legitimacy of crimes and punishments emerged in the 18th century as a reaction to the judges' dominance at that time. During this period, judges conflated criminal offenses with moral misconduct and religious intolerance¹. The history of this principle is linked to the time when signs of the separation of powers within the state began to emerge. Previously, rulers wielded consolidated authority, and judges rendered judgments that aligned with the desires of these rulers.²

The principle of legitimacy is based on two fundamental pillars: one logical and the other political. Concerning the political pillar, its foundation lies in the theory of the social contract. As for the logical pillar, it is based on the fundamental idea that reforming the judiciary necessitates depriving it of its absolute authority. This can only be achieved by restricting the judge with a written text that specifies the crime and its punishment³. The judge himself does not undertake the creation of this written text; rather, the legislative authority, as the primary source, assumes this crucial task.

Therefore, "the principle sets a clear boundary between the jurisdiction of the legislator and the jurisdiction of the judge. Anything falling within the jurisdiction of the former thereby falls outside the jurisdiction of the latter. The judge cannot consider an act as a crime unless there is a legal provision worded by the legislator that criminalizes this act. If such a provision is not found, there is no way to consider the act as a crime, even if the judge believes it contradicts justice, morals, religion, or harms society to the greatest extent".⁴

Therefore, the principle of the legitimacy of crimes and punishments entails several important consequences, including:

1. Confining the sources of legislation and punishment to legislation as a primary source.
2. Obliging the judge not to deviate from the texts of criminalization and punishment when interpreting and applying them.
3. The non-retroactivity of rules of criminalization and punishment to the past.⁵

The last consequence does not fall within the scope of the contents of this study.

1- The extent to which legislation is considered as the sole source of criminalization and punishment:

"The principle of the legitimacy of crimes and punishments confines the sources of criminalization and punishment to the law"⁶. Embracing this principle entails that the task of criminalization and punishment is entrusted to a specific body, which no other entity is allowed to encroach upon⁷. By

¹ Dr. Bousqia, Ahsan, Concise Overview of General Criminal Law, Vol. 01, 10th Edition, Algeria, Dar Huma, 2010, p. 65.

² Dr. Al-kahwaji Ali Abdul Kadir, Explanation of the Penal Code - General Section: A Comparative Study, 2nd edition, Beirut, Al-Halabi Legal Publications, 2001, p. 60.

³ Dr. Bousqia, Ahsan, the previous reference, p. 66.

⁴ Dr. Hossni, Mahmoud Najib, Explanation of the Penal Code - General Section - General Theory of Crime, Cairo, Dar Al-Nahda Al-Arabiya, 1962, p. 70.

⁵ Dr. Kahwaji, Ali Abdelkader, the previous reference, p. 71.

⁶ Dr. Hossni, Mahmoud Najib, the previous reference, p. 70.

⁷ Dr. Al-Kahwaji, Ali Abdelkader, the previous reference, p. 60.



this designated body which is the legislative authority, consequently, a set of legal consequences and effects arises from adhering to this principle”.

Some legal scholars argue that the principle of legality in the field of criminal law means that this law has only one source, which is the written law. Thus, it differs from other branches of law that incorporate additional sources such as custom and Islamic law into the text of the law”¹.

Another aspect of jurisprudence suggests that the principle of legality in crimes and punishments means “assigning the task of defining crimes and specifying their penalties to the legislative authority. According to this perspective, the legislative authority is the sole entity entrusted with identifying actions that constitute crimes and determining the criminal sanctions resulting from each of them in a precise and clear manner”.²

Although both opinions agree on the written form adopted by criminal rules that determine the criminalization of actions and specify the penalties, it seems that the first concept expands the notion of the legitimacy of crimes and punishments. Despite confining the sources of criminal law to written law, it does not exclude regulations issued by the executive authority in the form of decrees and decisions, which are labeled as acts of the executive authority”³.

Apparently, the proponents of the second concept, which seems narrow in confining the determination of crimes and punishments solely to the legislative authority, It is based on the fact that the latter represents the entire society by virtue of the social contract. The principle of legality is seen as a result of the struggle between authority and the individual. Societies have endured long periods where ruling classes monopolized all powers. The 18th and 19th centuries witnessed the dominance of the aristocratic and bourgeois classes striving to retain all powers in their hands. This ultimately led to a clash between parliament and governance, culminating in the affirmation of popular sovereignty and the parliament's assertion of its authority in legislation concerning rights and freedoms”⁴.

Contrary to this opinion, the jurist Dr. Mahmoud Naguib Hossni believes that: “Legislative provisions are not required to emanate solely from the legislative authority; it suffices that they originate from an authority specialized in legislation. To clarify, if the original jurisdiction lies with the legislative authority, then the constitution or the law may grant limited legislative authority to the executive branch. Therefore, texts issued by it constitute legislation and thus qualify as a source for criminalization and punishment”⁵, he bases his opinion on the ruling issued by the Egyptian Court of Cassation on January 12, 1959.⁶

This opinion finds resonance within relevant constitutional provisions. It's worth noting that the Algerian Constitution, in Article 139, stipulates that: “Parliament legislates in the fields allocated to it by the Constitution, as well as in the following areas: - General rules of criminal law and criminal procedures, especially the definition of crimes and misdemeanors, corresponding penalties, general amnesty, extradition of criminals, and prison system”⁷.

¹ Dr. Bousqia, Ahsan, the previous reference, p. 65.

² Dr. Kahwaji, Ali Abdelkader, the previous reference, p. 65.

³ Dr. Bousqia, Ahsan, the previous reference, p. 73.

⁴ Dr. Sorour, Ahmed Fathi, *Constitutional Criminal Law - Constitutional Legitimacy in Penal Law - Constitutional Legitimacy in Criminal Procedure Law*, Cairo, Dar El Shorouk, 2002, p.38.

⁵ Dr. Hossni, Mahmoud Najib, the previous reference, p. 75.

⁶ Court of Cassation Ruling dated January 12, 1959, *Collection of Court of Cassation Judgments*, Volume 10, Number 10, p. 35, cited from Dr. Hossni, Mahmoud Najib, the previous reference, p. 75.

⁷ Article 07 of Article 139 of the Algerian Constitution is in effect. Please refer to Presidential Decree No. 20-442 dated December 30, 2020, related to issuing the constitutional amendment, which was approved in the referendum on November 1, 2020, in



In this context, two considerations arise. The first is that violations also fall within the original jurisdiction of the legislative authority. This can be inferred from the wording of Article 139 of the Constitution, which suggests that felonies and misdemeanors are provided as examples, not an exhaustive list, given the constitutional legislature's use of the term "especially." This view is supported by provisions within the Algerian Penal Code itself, where the legislator has allocated a separate section, namely Book Four of Part Two, to violations and their penalties, starting from Article 440 and following.¹

As for the second assumption, it means that both felonies and misdemeanors fall within the original jurisdiction of the legislative authority. The determination of violations is left subsidiary to the executive authority, which seems consistent with Article 91, Section 9 of the Algerian Constitution, granting the President of the Republic regulatory powers. These powers relate to areas outside the jurisdiction of parliament, where they take the form of presidential decrees. Additionally, the constitutional provisions in Algeria grant the Prime Minister or the Head of Government, as the case may be, a range of powers specified in Article 112 of the Constitution, including the authority to sign executive decrees, which represent another form of regulations. This direction appears to reflect the prevailing opinion on this matter.

2. The legal implications resulting from considering the law as the sole source of criminalization and punishment

The criminal legislation must include legal principles, meaning rules that possess all the characteristics of legal rules, especially those of generality, abstraction, and obligation. Thus, individual administrative decisions facing specific cases are excluded.² As dictated by the principle of legality, criminal law must be in written form. This requirement is intuitively derived from the necessity for legislation to be the source of criminal rules. The concept of criminal legality necessitates this requirement because it requires that those subject to criminal rules be aware of them in advance. Moreover, this condition provides stability in concepts to confirm people's knowledge of the commands and prohibitions expressed in these rules.³

The principle of legality also requires the law to define the elements of the crime⁴, where the legislative authority must issue its legislation clear, specific, and free from ambiguity and indeterminacy.⁵ "The legislator must not only define the acts considered crimes, but should also specify each crime by detailing its elements and components in a way that avoids ambiguity and dispels ignorance. When determining criminal penalties, the legislator should consider explaining the purpose, nature, extent, and method of assessment.⁶

The basis for this is that penal laws imposing restrictions on personal freedom are the most serious and impactful constraints. Therefore, to ensure this freedom, the actions deemed criminal by these laws must be clearly defined to avoid confusion with others. Moreover, they should always be explicit and clear in delineating the narrow boundaries of their prohibitions.⁷

the Official Gazette of the People's Democratic Republic of Algeria, Issue No. 82 issued on December 30, 2020.

¹ Decree No. 66-156 dated June 8, 1966, which includes the Penal Code, as amended and supplemented, published in the Official Gazette of the People's Democratic Republic of Algeria, Series J, No. 49, issued on June 9, 1966.

² Dr. Al-Kahwaji Ali Abdelkader, the previous reference, p. 71

³ Dr. Sorour, Ahmed Fathi, the previous reference, p. 86.

⁴ Dr. Bousqia, Ahsan, the previous reference, p. 76.

⁵ An Egyptian cassation ruling dated 22-03-1948, group of provisions number 70, page 330.

⁶ Dr. Al-Kahwaji Ali Abdelkader, the previous reference, page 76.

⁷ Dr. Sorour, Ahmed Fathi, the previous reference, p. 89.



Therefore, the legislator should not suffice with stating that an act is punishable, but rather, it is incumbent upon them to specify the circumstances under which one is liable to punishment,¹ the clarity and precision of criminal provisions facilitate the work of the judge in interpreting and applying them in accordance with the legislator's intent. Obscurity or deficiency in these provisions may lead to difficulties in interpretation, posing the risk of judges adding or omitting elements that do not reflect the legislator's intent, or rendering interpretation impossible, thus compelling the judge to rule in favor of acquittal. In both cases, this constitutes a violation of the principle of the legitimacy of crimes and punishments.²

It appears that the precision of criminal texts as one of the most important outcomes resulting from adherence to the principle of the legitimacy of crimes and punishments is not entirely absolute. In this regard, some jurisprudence suggests: "However, it is also possible that criminalization may not be precise in all respects. The legislator may suffice with stating that an act is punishable without specifying its constituent elements".³

Secondly: Interpreting the rules of criminalization and punishment

Interpreting legal texts is not limited to a specific one than another, as all legal rules require understanding their content in order to apply them correctly. However, criminal law stands out from other laws because it is governed by the principle of legality⁴.

One of the significant outcomes of adhering to the principle of legality is depriving judges of criminalizing acts that are not stipulated by the legislator or determining penalties that are not included in the provisions of criminalization and penal code. This led to closing a wide door through which they used to restrict individuals' freedoms and deprive them of their fundamental rights⁵.

The criminal judge adheres to interpreting criminal laws, which are contained in both penal and procedural codes, to determine their true content as an expression of the legislator's will to achieve the effectiveness of criminal justice or to safeguard rights and freedoms, thereby upholding the principle of legality in doing so⁶.

1. The Scope of Interpreting Criminal Legislation

Interpreting criminal legislation means uncovering the true intent of the legislator through the words and phrases contained in the legal provision to be interpreted. The words and phrases found in legal texts are merely a means by which the legislator expresses his intent, and the interpreter's task is to reveal the true nature of that intent and determine its content through these words and phrases, which become valid for application after interpretation by the judiciary on the facts presented.⁷

The study of the interpretation of criminal laws by the criminal judge finds a division of different opinions. The first opinion considers that: "If criminalization and punishment are based on the law, then it is incomprehensible to talk about narrow or literal interpretation of the law. When the judge interprets the law, he does not give his personal opinion, but he seeks the true meaning of the law and its objective value as intended by the legislator".⁸

As for the second opinion, it is based on depriving the judge of criminalizing acts that are not explicitly stipulated by the legislator or imposing punishments not included in the provisions of criminalization and punishment. Consequently, "to close all other avenues through which the

¹ Dr. Bousqia, Ahsan, the previous reference, p. 77.

² Dr. Al-Kahwaji Ali Abdelkader, the previous reference, p. 77.

³ Dr. Bousqia, Ahsan, the previous reference, p. 78.

⁴ Dr. Bouhjar, Hossam, Interpretation of Objective Criminal Texts, Judicial Dedication Magazine, Volume 14, Issue 30, 2022, pp. 267-280, p. 269.

⁵ Dr. Al-Kahwaji Ali Abdelkader, the previous reference, page 89.

⁶ Dr. Sorour, Ahmed Fathi, the previous reference, p. 95.

⁷ Dr. Al-Kahwaji Ali Abdelkader, the previous reference, page 87.

⁸ Dr. Sorour, Ahmed Fathi, the previous reference, p. 95.



judiciary could exploit and exercise its previous control function, the judge is obliged to interpret the rules of criminalization and punishment narrowly when applying them to the facts presented by him.”¹ In addition to that, some add to this issue by saying: “Most jurists argue that the interpretation of criminal texts should be narrow, while others say it should be narrow against the interest of the accused and broad in his favor.”²

Therefore, there is a divergence of opinions on the same issue, as the first is not primarily concerned with the idea of narrow interpretation but considers the judge's task to be interpretation, done by seeking the legislator's intent only. The second advocates for narrow interpretation, while the third supports narrow interpretation in favor of the accused, with the possibility of broadening the interpretation itself for the same favor.

In addition, adhering to the principle of narrow interpretation results in the stagnation of criminal legislation and its failure to keep pace with modern civil reasons and general societal development³, rather, it distances legislation from protecting society in the circumstances it finds itself in. It is unreasonable to assume that the text's expression encompasses or indicates all situations harmful to society. Ultimately, this interpretation prioritizes the wording over the intent of the legislature.⁴

In order to clearly delineate the scope of applying the principle of narrow interpretation of criminal text while considering the benefit of the accused, a portion of jurisprudence, whose opinion we support, suggests: “If the judge is bound by the narrow interpretation of criminal texts that are not in favor of the accused, such as those defining the elements of the crime and penalties, there is nothing preventing the judge from interpreting criminal laws that are in favor of the accused in a broad and accommodating manner. This includes legal provisions specifying grounds for exoneration, limitations of liability, as well as provisions related to procedures and forms enacted by the legislator to ensure individual freedoms and rights of defense.”⁵

Therefore, it is incumbent upon the judge, in interpreting the rules of criminalization and punishment, to seek the legislator's intent. “His position in this matter does not deviate from one of two assumptions: the first assumption if the text is ambiguous, and the second assumption if the text is clear.”⁶

If the criminal text is ambiguous and susceptible to multiple interpretations, it is incumbent upon the judge to give the text its real meaning by espousing the legislator's intent. The judge relies on logical and linguistic considerations and the context in which the text is found. In this context, the judge may refer to the preliminary work of the parliament by consulting the report of the relevant committee and the discussions that took place in parliament. If the judge cannot reach the legislator's intent, he must interpret the text by choosing the meaning that leads to permissibility rather than criminalization, in accordance with the principle of “no crime without law.”⁷

If the criminal text is clear, the judge is not allowed to interpret it but must apply it in accordance with the principle of “no interpretation when the text is clear.” The judge is first required to refer to the text of the law itself and apply it to the facts of the case within the limits of the text's wording. If the meaning is clear, it is not permissible to take anything contrary to it.⁸

2. The prohibition of analogy in matters of criminalization and punishment

¹ Dr. Al-Kahwaji Ali Abdelkader, the previous reference, page 89.

² Dr. Hossni, Mahmoud Najib, the previous reference, p. 95.

³ Dr. Al-Kahwaji Ali Abdelkader, the previous reference, page 89.

⁴ Dr. Hossni, Mahmoud Najib, the previous reference, p. 93.

⁵ Dr. Bousqia, Ahsan, the previous reference, p. 78.

⁶ Dr. Al-Kahwaji Ali Abdelkader, the previous reference, page 91.

⁷ Dr. Bousqia, Ahsan, the previous reference, p. 82.

⁸ Dr. Al-Kahwaji Ali Abdelkader, the previous reference, page 98.



If the interpreter of criminal law is to seek the intent of the legislature using every available method, they must respect the principle of "legality of crimes and punishments". This means that they should stop their inquiry when it becomes apparent to them that their interpretation might lead them to pronounce crimes or punishments not specified by the law. Adhering to this restriction leads to the prohibition of analogy for those interpreting criminal statutes.¹

Criminalizing by analogy involves extending the authority of a legal provision to a situation beyond its explicit scope based on mental inference, relying on the implicit spirit of the law in which the judge wants to exert effort to apply the true intent of the legislator to the case. It stems from the principle of similarity between the model provided by the text and another situation. In simpler terms, analogy is the application of a legal provision to a current situation not covered by the text, but which the legislator would have intended to punish had they considered it at the time of enacting the law.²

Analogy is not considered as a means to extract the intention of the law within the framework it was used, but rather it is supposed that the law did not regulate the matter under consideration and did not directly provide the required solution for its application.³ Applying it in this way would lead to the judge's will replacing that of the legislator, which would undermine the principle of the legitimacy of crimes and punishments⁴. The Egyptian Court of Cassation has ruled that: "It is established that caution must be exercised in interpreting criminal laws, and precision must be adhered to without imposing meanings beyond their scope, while considering the prohibition of analogy in the field of criminalization".⁵

Conclusion

After discussing the elements of the subject by addressing aspects related to the principle of legality of crimes and punishments in terms of its concept and scope, as well as the limits of intervention of the criminal judge within this scope, especially concerning the interpretation of legal rules shrouded in ambiguity, the following research findings are noted:

- The outcome of the principle of legality in the field of criminal law is that this law has one source, which is written law, confining the sources of legislation and punishment to legislation as a general principle. There is no objection for regulations issued by the executive authority, such as decrees and decisions, to include criminal provisions that criminalize and punish certain actions, but only in the realm of misdemeanors.
- The principle of legality dictates that the criminal text must be in written form. The concept of criminal legality necessitates this condition because it requires that those subject to criminal rules be aware of them in advance.
- The principle of legality also requires that the law defines the elements of a crime. The criminal text must be clear and specific, free from ambiguity and vagueness. It is not sufficient for the legislator to merely enumerate the acts considered crimes; rather, each crime must be clearly defined, outlining its elements and components in a manner that avoids ambiguity and dispels ignorance. When determining the criminal penalty, consideration must be given to specifying its nature, extent, amount, and method of assessment.
- The criminal text must be clear, and it is not for the judge to interpret it but rather to apply it. If the text is somewhat ambiguous, it is incumbent upon the judge to ascertain the true

¹ Dr. Hossni, Mahmoud Najib, the previous reference, p. 94.

² Dr. Ibrahim, Akram Nashat, *Criminal Policy (A Comparative Study)*, 1st Edition, Amman, Dar Al-Thaqafa for Publishing and Distribution, 2008, p. 75.

³ Dr. Sorour, Ahmed Fathi, the previous reference, p. 101.

⁴ Dr. Al-Kahwaji Ali Abdelkader, the previous reference, page 96.

⁵ The appeal No. 27354 of the year 59 judicial session dated 15-11-1994, Judgments of Cassation - Technical Bureau - Criminal, Year 45, p. 1001:

<http://www.laweg.net/Default.aspx?action=LawEg&Type=16&JID=64858>



intent of the legislator through the words and phrases contained in the legal provision being interpreted. Moreover, interpretation should be narrow when it comes to the defendant's interests and broad when it serves them.

- In the realm of criminal law, analogy should be prohibited. However, if the text stipulates a reason for permissibility or non-liability, or for the absence of punishment, then this principle does not apply. Therefore, resorting to analogy in interpreting it is permissible because this analogy is a corollary to the general principle in actions, which is permissibility.

REFERENCES LIST

First: The Books

- [1] Al-Kahwaji, Ali Abdul Kader, Explanation of the Penal Code - General Section: A Comparative Study, Beirut, Aleppo Legal Publications, 2001.
- [2] Bousqia, Ahsan, Concise Overview of General Criminal Law, Vol. 01, 10th Edition, Algeria, Dar Huma, 2010.
- [3] Husni, Mahmoud Naguib, Explanation of the Penal Code - General Section - General Theory of Crime, Cairo: Dar Al-Nahda Al-Arabiya, 1962.
- [4] Ibrahim, Akram Nashat, Criminal Policy (A Comparative Study), 1st ed., Amman, Dar Al-Thaqafa for Publishing and Distribution, 2008.
- [5] Sorour, Ahmed Fathi, Constitutional Criminal Law - Constitutional Legitimacy in Penal Law - Constitutional Legitimacy in Criminal Procedure Law, 2nd edition, Dar Al-Shorouk, Cairo, 2002.

[6] Second: Legal Texts

- [7] Presidential Decree No. 20-442 dated December 30, 2020, concerning the issuance of constitutional amendments, approved in the referendum of November 2020, published in the Official Gazette of the People's Democratic Republic of Algeria, Issue No. 82, dated December 30, 2020.
- [8] Order No. 66-156 dated June 8, 1966, containing the Penal Code, as amended and supplemented, published in the Official Gazette of the People's Democratic Republic of Algeria, Issue No. 49, dated June 9, 1966.

[9] Third: Scientific articles

- [10] Professor Athamnia Lakhmissi, Interpretation in Criminal Law and Its Impact on Legislative Movement, Judicial Ijtihad Journal, Volume 01, Issue 01, 2004, pp. 43-64.
- [11] Dr. Bouhjar, Hossam, Interpretation of Objective Criminal Texts, Judicial Dedication Magazine, Volume 14, Issue 30, 2022, pp. 267-280.

[12] Fourth: Websites

- [13] The link : <http://www.laweg.net/Default.aspx?action=LawEg&Type=16&JID=64858>