CONSIDERATIONS ON THE PRINCIPLE OF LEGALITY OF CRIMINALISATION

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Abstract

Although the new Criminal Code made a series of amendments to the criminal legislation, the regulation of the principle of legality of criminalisation has not been significantly changed, but only from the point of view of the structure of governing rules.

Thus, while the previous Criminal Code regulated through a single provision both the legality of criminalisation and the legality of criminal penalties, the new Criminal Code has split the content of the principle of legality of criminalisation and criminal penalties into two principles - the legality of criminalisation and the legality of criminal penalties, by allocating them two separate articles in Chapter I of Title I of the General Part.

In this article, we aim to examine the theoretical side of the substance of the principle of legality of criminalisation and to analyse some of the most important legal issues concerning the application of this principle in the case-law.

Keywords*: Legality, legality of criminalisation, foreseeability of criminal law, retrospective effect of criminal law, continuing effect, application of the more favourable criminal law.*

1. Introduction

In a democratic regime based on the **rule of law**, the state's **right to punish** (*jus puniendi*) **is restricted**, therefore the latter must punish only those acts which constituted criminal offences at the time when they were committed and impose solely the penalties existing in the system of penalties at the time when the criminal offence was committed, except when a more lenient criminal law enters into force before the criminal relationship of conflict ceases. Although the principle of legality is a basic rule of the entire legal system, it is also a fundamental principle of criminal law and should be dealt with in a special manner, because the legality in the field of criminal law has a particular nature, has some distinctive features. The specific features of legality in the field of criminal law are given by two components: the legality of the regulation of the act which constitutes a criminal offence and the legality of penalties. The principle of legality is expressed in the well-known adages: *nullum crimen sine lege* și *nulla poena (sanctio) sine lege*.

In this article, we aim to examine the theoretical side of the substance of the principle of legality of criminalisation and to analyse some of the most important legal issues concerning the application of this principle in the case-law.

The new Criminal code has no longer compressed the principle of legality of criminalisation and the principle of legality of criminal penalties in a single article, as they were regulated by the 1969 Criminal code, but it has reserved an article to each of the two principles, namely Articles 1 and 2. According to Article 1 of the Criminal code, having the *nomen juris* **the legality of criminalisation**: "*(1) Criminal law defines the acts that constitute offences.*

(2) No person can have criminal liability for an act that was not covered by criminal law at the date of its commission"[1].

One can note that the legislator has expressed two fundamental ideas in the two paragraphs dedicated to the principle of legality of criminalisation: **the compulsory existence of the criminalisation rule** (*nulum crimen sine lege*) **and the non-retrospective effect of the criminal law criminalising *ex novo*.**

We specify that the provision found in Article 1 paragraph (2) of the Criminal code, according to which: "*No person can have criminal liability for an action that was not covered by criminal law at the date of its commission*" is, in fact, taken in another form from the provisions of Article 11 of the previous Criminal code[2].

According to Article 2 of the Criminal code, having the nomen juris **the legality of criminal penalties**: "(1) Criminal law establishes applicable penalties and educational measures that can be ruled against persons who committed offences, as well as security measures that can be ruled against persons who committed actions covered by criminal law.

(2) No penalty, educational or security measure can be ruled that was not stipulated in criminal law at the date when the violation was committed.

(3) No penalty can be ruled and enforced outside the law's general limits".

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[1] As regards the fact that Article 1 paragraph (2) of the Criminal code mentions the penalty and not the criminalisation, the doctrine has specified:"the consistency specific to a thorough legislative technique would have required a more coherent expression of the idea, by making recourse to a slightly different wording, avoiding the explicit reference to the penalty and sending a direct message concerning the concept of criminalisation" (See M.-I. Michinici and M. Duinea, in T. Toader, M.-I. Michinici, R. Răducanu, A. Crișu-Ciocîntă, S. Răduleț, M. Duinea, The New Criminal Code. Commentaries on articles, Hamangiu Publishing House, Bucharest, 2014, p.5).

[2] According to Article 11 of the previous Criminal code: "Criminal law shall not apply to any act which did not constitute a criminal offence at the time when it was committed".

Giving efficiency to the requirement of clarity and foreseeability of criminal law (*in claris non fit interpretatio*), the new Criminal code lays down *expressis verbis*, in the legal provision dedicated to the principle of legality of criminal penalties, **all three categories of criminal penalties: penalties, educational measures and security measures.**

Also, the new Criminal code provides that the educational measures may be taken only against **persons who have committed criminal offences**, while in respect of security measures it provides that these may also be taken against the **persons who have committed mere acts provided for by criminal law**, which do not fulfil the elements of criminal offences.

Then, in Article 2 paragraph (2) of the Criminal code, the legislator emphasizes the idea of non-retrospective effect of criminal law, by laying down the prohibition according to which no penalty, educational or security measure can be ruled that was not stipulated in criminal law at the date when the violation was committed.

Finally, Article 2 paragraph (3) of the Criminal code lays down a provision unmatched in the 1969 Criminal code, according to which **no penalty may be imposed and enforced outside the general limits thereof.**

2. Analysis of the principle of legality of criminalisation

The legality of criminalisation is a fundamental principle of criminal law, intended for the legislator and the judicial bodies, according to which only the acts defined by criminal law at the time when they were committed constitute criminal offences and may be punished by criminal law[3].

It is normal to be so because the recipient of the law must relate his behaviour to the legal rules in force at the time when the conduct is carried out. The legality of the criminal offence means the clear and precise description of the acts which constitute criminal offences (*nulum crimen sine lege certa*). The determination of acts which constitute criminal offences must be carried out by using an everyday and accessible language, in order to avoid the risk of avoiding the law by analogy and the misunderstanding of the criminalisation rules. If technical or special terms are used, the legislator must contextually interpret them[4].

The legality of criminalisation was criticized on the ground that the criminal law founded on this rule cannot keep pace with social evolution, because the social relationships constantly change. If the new illegal acts committed in society cannot be foreseen, then acts dangerous to the social values would remain unpunished and only acts whose elements do not require anymore the application of the criminal constraint would be punished[5]. On the other hand, the principle of legality does not protect the recipient of the criminal law in the case where tyrannical laws are adopted, because observing such a law amounts to the acceptance of the abuse.

This point of view may not be accepted, for the arguments summarised below.

First of all, individuals guide their behaviours by the legal rules in force at the time when they engage in conduct. A subject of law may not be required to anticipate the future criminalisations.

Secondly, the legality of criminalisation guarantees that no discrimination or inequality in the legal treatment arise from the application of criminal law in similar cases. There are many cases of unequal application of criminal law by the use of the institution laid down in Article 18^1 of the previous Criminal code (the act does not pose a danger to society). Using the models provided by comparative laws, in particular the French criminal law, the new Criminal code provides, for example, that in the case of acts punishable by imprisonment of not more than one year, the court may waive the punishment of the defendant who has no criminal records and proved that he can be rehabilitated even without punishing him.

On the other hand, if the principle of legality is not regulated, the powers of the judiciary would partially overlap with those of the legislative, which may not be accepted in a state governed by the rule of law, even if it is accepted that separation of powers does not mean their isolation.

In order to be the basis for the imposition of the criminal penalty, the act must constitute an offence under criminal law not only at the time when it is committed, but also at any time after that date, until the final judgment which solves the criminal relationship of conflict is rendered.

The first coherent theoretical approach of legality of criminalisation is found in the work of Cesare Beccaria, *Dei delitti e delle pene*[6]. Beccaria said that "*the laws only can determine the punishment of crimes, and this authority can only reside with the legislator, who represents the whole society* (...)"[7]. More than a

[3] See M.A. Hotca, P. Buneci, M. Gorunescu, N. Neagu, R. Slăvoiu, R. Geamănu, D.G. Pop, Criminal law institutions, Universul Juridic Publishing House, Bucharest, 2014, p.11.

[4] The Strasbourg Court has stated in its case-law: "Article 7 paragraph 1 of the Convention is not confined to prohibiting the retrospective application of the criminal law to an accused's disadvantage. It also embodies, more generally, the principle that only the law can define a crime and prescribe a penalty (nullum crimen, nulla poena sine lege) and the principle that the criminal law must not be extensively construed to an accused's detriment, for instance by analogy; it follows from this that an offence must be clearly defined in law" (*Kokkinakis vs Greece*, 1993).

[5] *G. del Vecchio*, Essais sur les principes généraux du droit, Paris, 1938, p. 78; *T. Vasiliu, G. Antoniu, Ş. Daneş, Gh. Dărîngă, D. Lucinescu, V. Papadopol, D. Pavel, D. Popescu, V. Rămureanu*, The Commented and Annotated Criminal Code, Scientific Publishing House, Bucharest, 1972, p.18.

[6] *C.Beccaria*, On crimes and punishments, Rosetti Publishing House, Bucharest, 2002.

[7] Ibidem, p. 39.

century after Cesare Beccaria had stated and argued the principle of the legality of criminalisation, the latter has been enshrined for the first time in a regulatory act, the Declaration of the Rights of Man and of the Citizen, adopted following the 1789 French Revolution. Article VIII of this regulatory act provided that: "*no one can be punished but under a law established and promulgated before the offence and legally applied.*"

The principle of legality of criminalisation is very important for criminal law, because criminal law is the law area which imposes the most severe legal liability in the society. History, even the recent one, tells us what might happen if this principle is not regulated. The transposition of the principle of legality of criminalisation in the social life also implies that the legislator criminalises only those antisocial acts which might substantially harm the social defence relationships. Thus, the legislator must decriminalise certain acts which are irrelevant from the viewpoint of criminal law, namely to remove from the scope of criminal offences those acts which do not pose the social danger required for criminal repression.

In another train of thoughts, the legislator must monitor the dynamique of social relationships in order to intervene promptly and to criminalise new dangerous acts, whenever this is necessary.

The principle of legality of criminalisation is regulated by many international, universal or regional treaties. For example, by Article 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

Art.15 of the International Covenant on Civil and Political Rights enshrines the principle of legality in the following terms: "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".

In Romanian law, all previous criminal codes, including the 1923 Constitution, have enshrined the legality of criminalisation.

We specify that the application of temporary criminal law, after it ceases to be in force, to the acts committed during the period in which it was in effect is not a derogation as such from the principle of effectiveness of criminal law (the academic literature uses the wording **improper continuing effect**), but it is rather a particular application thereof (*tempus regit actum*). Possible derogations from the rule of effectiveness of criminal law are the retrospective effect and the continuing effect of criminal law.

De lege lata, **the continuing effect of criminal law** as such has no practical relevance, because it would mean that a previous law, which ceased to be in force before a criminal offence was committed, still applies to an act committed after the previous law has ceased to be in effect, although it was not in force on the date when the act in question have been committed.

The retrospective effect of the more favourable criminal law is allowed on the basis of constitutional provisions. Indeed, according to Article 15 paragraph (2) of the Constitution: *"(2) The law shall only act for the future, except for the more favourable criminal or administrative law".* It follows from the provisions of Article 15 paragraph (2) that the retrospective effect of criminal law is an exception from the rule of non-retrospective effect of criminal law, but which may be restricted by the legislator.

The principle of legality of criminalisation imposes five standards, and in the absence of any of them one cannot speak of ***legality*** within the meaning of the principle we are dealing with here. Indeed, a criminal law complies with the principle of legality if it is:

a) **Written** (*lex scripta*);
b) **Certain** (*lex certa*);
c) Non-retrospective (*lex pravevia*);
d) **Strict** (lex stricta);
e) Adopted according to the Constitution[8].

1. Lex scripta

Thus, an inherent requirement for the existence of the criminal offence is the definition of the elements of the act deemed criminal offence by a written law (*lex scripta*). Romanian law - member of family of the Romano-Germanic law system - does not accept, as a rule, other formal sources (custom, settled case-law).

This requirement does not need special discussions, because criminal laws are always written laws[9]. **Only written laws have to ability to comply with the requirement of** accessibility of criminal law. **The European Court of Human Rights has held that, in order to be imposed by the coercive force of the state, the law must be sufficiently accessible, in the sense that any person must be able to have information on the legal rules applicable in a given situation**[10].

The Constitutional Court also agreed to this standard of quality of the law. According to the Constitutional Court, from a formal viewpoint, the accessibility of law concerns the information of the public on the infra-constitutional legal acts and their entry into force, which is carried out under Article 78 of the Constitution, meaning that the law is published in the Official Journal of Romania, Part I, and enters into force 3 days of the date of the publication or on a further date provided for by it.

The Constitutional Court has specified that:"*But, in order to meet the requirement of accessibility of the law, it is not enough for a law to be brought to the attention of the public, but it is necessary that the regulatory acts governing a specific field are both logically connected so as to enable the recipients thereof to determine the content of the regulated field and identical from the point of view of their legal force.*

[8] See F. Streteanu, *Criminal Law*. *General Part,* Rosetti Publishing House, Bucharest, 2003, p.49.
[9] The academic literature also mentions several exceptions. For example, the custom (see F.Streteanu, op.cit., p.110).
[10] Criminal law must be sufficiently accessible (see the case Sunday Times v. Great Britain, 1979).

It cannot therefore be allowed a scattered regulation of the field or which is a result of the correlation between regulatory acts with different legal force. In this respect, the legislative techniques rules concerning the integration of the project in the entire body of legislation state that the regulatory act must be organically integrated in the system of legislation, for which purpose the regulatory act must be correlated with the provisions of regulatory acts of higher level or of the same level to which it is connected with (Article 13 letter (a) of the Law No 24/2000). The reference provision (Article 16, second sentence of paragraph 1 of the Law No 24/2000), which always operates between regulatory acts with the same legal force shall be used for the purpose of emphasizing certain legislative connections"[11].

2. Lex certa

The law, in general, and the criminal law, in particular, must be foreseeable. The European Court of Human Rights has held that a law should be not only accessible, but also foreseeable, meaning that it is formulated with sufficient precision to enable the citizen to regulate his conduct[12]. In another case, the European Court of Human Rights has held that the law should accessible to the person concerned and foreseeable as to its effects. For a law to be foreseeable, it must indicate the scope of any such discretion conferred on the competent authorities and the manner of its exercise with sufficient clarity, having regard to the legitimate aim of the measure in question, to give the individual adequate protection against arbitrary interference[13].

The certain nature of criminal law is related to the **foreseeability** of this law, which must be, par excellence, a clear and precise law (*in claris non fit interpretatio*). Giving effectiveness to the principle of legality of criminalisation, the Constitutional Court has declared unconstitutional several criminalisation rules on the ground of failure to meet the **clarity** requirement[14].

By way of example, we mention Decision No. 363/2015 and Decision No. 603/2015, by which the provisions of Article 6 of the Law no. 241/2005, Article 301 of the Criminal code and Article 308 of the Criminal code have been declared unconstitutional.

In the grounds of the Decision No. 363/2015, the Constitutional Court has held the following: "*the achievement by the state of specific objectives, even when they are of general interest and necessary, may only be made in compliance with the Constitution, which, according to Article 1 paragraph (5), is mandatory. Thus, a subject of law may not be required to comply with a law that is not clear, precise, foreseeable and accessible, whereas he is not able to adapt the conduct according to the normative assumption of the law; this is precisely why the legislative authority, the Parliament or the Government, as the case may be, has the obligation to lay down rules which comply with the features shown above*"[15].

In the grounds of the Decision No. 603/2015, the Constitutional Court has held: "the words 'commercial relationships' found in the provisions of Article 301 paragraph (1) of the Criminal Code are lacking clarity and foreseeability, preventing the precise determination of the elements of the offence of conflict of interests.

This lack of clarity, precision and foreseeability of the words 'commercial relationships' found in the provisions of Article 301 paragraph (1) of the Criminal Code is contrary to the principle of legality of criminalisation provided for in Article 1 of the Criminal Code and in Article 7 of the Convention for the protection of human rights and fundamental freedoms, and, consequently, to the provisions of Article 1 paragraph 5 of the Constitution, that refer to the quality of the law"[16].

However, the precision of criminal law should not be understood in an absolute manner. The wording used by the legislator is, however, a general one, which concerns indefinite persons and the behaviours prohibited by the rules of criminalisation must be described by sufficient elements so that the recipients are able to understand the contents of the law, even if sometimes they need to make recourse to experts. In other words, the legislator admits a margin of discretion of judicial bodies in assessing the contents of the law.

In this respect, the European Court of Human Rights has held that a law may still satisfy the requirement of foreseeability even if the person concerned has to take appropriate legal advice to assess,

[11] See Decision No 363/2015.

[12] See, for example, the judgment rendered in Sunday Times v. Great Britain, 1979. In this case, the Strasbourg court has held that: "*The citizen must have enough information on the legal rules applicable in a given case and be able to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. In short, the law must be accessible and foreseeable at the same time*."

[13] See the Judgment of 4 May 2000, rendered in Case Rotaru versus Romania, paragraph 52. The ECHR has also stated the rule of foreseeability in the Judgment of 25 January 2007, rendered in the Case Sissanis versus Romania, paragraph 66.

[14] See: Decision No. 189 of 2 March 2006, published in the Official Journal of Romania, Part I, No. 307 of 5 April 2006, Decision No. 903 of 6 July 2010, published in the Official Journal of Romania, Part I, No. 584 of 17 August 2010, or Decision No. 26 of 18 January 2012, published in the Official Journal of Romania, Part I, No. 116 of 15 February 2012, etc.

[15] Published in the Official Journal No 495 of 6 July 2015. By this decision the Constitutional Court has held that: "the provisions of Article 6 of the Law no.241/2005 on the prevention and fighting of tax evasion are unconstitutional".

[16] Published in the Official Journal No 845 of 13 November 2015. By this decision, the Constitutional Court has held that the words: "commercial relationships" found in the provisions of Article 301 paragraph (1) of the Criminal code (...)

"or within any legal person" found in the provisions of Article 308 paragraph (1) of the Criminal code, by reference to Article 301 of the Criminal code" are unconstitutional.

to a degree that is reasonable in the circumstances, the consequences which a given action may entail[17].

The Strasbourg Court has held that **legal rules cannot be drafted with absolute precision.** One of the standard regulation techniques consists of rather making recourse to general categories and not to exhaustive lists. Thus, many laws necessarily use more or less vague wordings, whose interpretation and application depend on the case-law. However 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 to changing circumstances. Although the certainty in drafting the law is desirable, this could lead to an excessive rigidity or the law must be able to adapt to changing circumstances. The decision-making role conferred to the court aims precisely at removing the doubts persisting in relation to the interpretation of rules, the progressive development of the criminal law through judicial law-making as source of law being a well-entrenched and necessary part of legal tradition of the Member States. Consequently, Article 7 paragraph 1 of the Convention cannot be read 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[18].

3. Lex praevia

Criminal law may not be retrospective, except for the more lenient law (*mitior lex*) and may not be applied by analogy[19].

The application of law by analogy means the extension of the scope of this law to acts not prescribed by the law. The analogy was regulated by the 1936 Criminal code and it was repealed by the Decree no.102/1956. In the inter-war period, the analogy was laid down even in the codes of certain western states with a democratic tradition; for example, in the 1930 Danish Criminal code.

According to the provisions of Article 3 of the Criminal code:"*Criminal law shall be applicable to offences committed when it is in force*"[20].

According to Article 4 of the Criminal code:"*Criminal law does not apply to actions committed under the applicability of the previous law, if such actions are no longer included in the new law. In such case, the serving of sentences, the educational and security measures ruled on under the previous law, as well as all criminal consequences of court judgments concerning those actions, shall cease once the new law comes into force*"[21].

According to Article 5 paragraph (1) of the Criminal code: "*In case one or several criminal acts have been enacted between the time the violation was committed and the final judgement in a case, the more favourable stipulation shall apply*".

According to the provisions of Article 6 paragraph (1) of the Criminal code: "*Whenever, between the time of the final judgement in a criminal case and the time the sentence is fully served, a law is enacted that stipulates a lighter penalty, the original sentencing shall be reduced to the special maximum of the new sentencing if the previous one exceeded that special maximum*".

Finally, according to Article 15 paragraph (2) of the Constitution: "*The law shall only act for the future, except for the more favourable criminal or administrative law*".

More favourable interpretative laws, the decriminalising laws and the more favourable laws *stricto sensu* fall within the scope of the more favourable criminal laws[22].

Criminal law may have retrospective effect only if it is:

- a decriminalising law;
- a more favourable new criminal law (including

[17] This is particularly true in relation to persons carrying 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 entails. (Judgment of 15 November 1996, rendered in Case Cantoni v. France, paragraph 35; Judgment of 24 May 2007, rendered in Case Dragotoniu and Militaru - Pidhorni versus Romania, paragraph 35; Judgment of 20 January 2009, rendered in case Sud Fondi SRL and others versus Italy, paragraph 109).

[18] See the Judgment of 22 November 1995, rendered in Case S.W. versus Romania, paragraph 36. See Decision No 405/2016 of the Constitutional Court of Romania.

[19] The application of law by analogy and the retrospective effect are two legal monstrosities. All dictatorships have made recourse to these "institutions" in order to achieve their totalitarian purposes and eliminate the "uncomfortable" persons. The fascist, Nazi and communist states of the 20th century have trampled on the principle of legality of criminalisation which is violated by the dictatorial states of today.

[20] The corresponding text of the previous Criminal code is laid down in Article 10 and has the following content: "Criminal law shall be applicable to offences committed when it is in force".

[21] According to Article 4 of the previous Criminal code: "(1) Criminal law shall not apply to actions committed under the applicability of the previous law, if such actions are no longer included in the new law. In such case, the serving of sentences, the educational and security measures ruled on under the previous law, as well as all criminal consequences of court judgments concerning those actions, shall cease once the new law comes into force. "

(2) The law prescribing security or educational measures shall also apply to criminal offences which have not been the subject of a final judgment until the entry into force of the new law".

[22] The laws concerning the regime of execution of criminal penalties may not have retrospective effect. By the Decision no.214/1997, the Constitutional Court has supported this point of view. According to this decision: "In the case of the institution of conditional release, the transitional situation is also created on the date when the criminal offence is committed and lasts until the penalty of life imprisonment or of imprisonment is executed or deemed executed. The intervention, during this period, of a criminal law which amends the institution of conditional release, as it is the case of the Law no. 140/1996, renders the determination of the applicable law subject to the rules contained in Article 15 paragraph (2) of the Constitution and Article 13 paragraph (1) of the Criminal Code, irrespective of the date on which the ruling of conviction has remained final.

Therefore, the provision of paragraph (1) of Article II of the Law no.140/1996, which refers to the applicability of the law to acts committed before its entry into force, violates the provision of Article 15 paragraph (2) of the Constitution of Romania."

the interpretative law);

- a procedural law (which shall apply immediately, irrespective of the date when the act was committed).

The **subsequent interpretative criminal law** may also decriminalise, if its content narrows down the sphere of facts deemed criminal offences by the previous jurisprudence of judicial bodies or if it determines a more favourable legal qualification. For instance, by reference to the provisions of the 1969 Criminal code, Article 183 of the Criminal code constitutes a subsequent more favourable interpretative criminal rule[23].

The subsequent interpretative criminal law is the law by which the legislator defines certain terms or expressions used by the criminal law after the entry into force of the interpreted law (rule).

4. Lex stricta

The principle of legality requires that the result of interpretation of the law is in line with the will of the legislator, i.e. it should be construed neither extensively, nor restrictively (*lex dixit quam voluit*). The extensive interpretation (*lex dixit minus quam voluit*) or the restrictive interpretation (*lex dixit plus quam voluit*) must not be admitted in criminal law.

In this context, the question is: how can one construe the criminal law in the cases where this is not clear, is equivocal or incomplete?

Although no express legal rule, which answers to this question, is prescribed, it follows **from the essence of the principle of legality that in such cases and in any other cases of unsatisfactory regulations, the criminal law shall be interpreted restrictively** - *lex poenalia est strictissimae interpretationis et aplicationis; poenalia sunt restringenda*.

The practitioner may not create criminal rules, may not extend the application thereof to unforeseen cases and must interpret any result of this operation in a strict manner, if the rule interpreted is unfavourable to the offender.

In the case of criminal rules with doubtful meaning, the adage "*in dubio mitis*" and not "*in dubio pro reo*" must be applied. This last adage is applicable only to the assessment of evidence during the criminal proceedings, because it is founded on the principle of the presumption of innocence[24].

It was held in the academic literature that "the rule of strict interpretation may not require the judge to confine the application of criminal law only to those hypotheses laid down by the legislator, when the careful analysis of the cases brought before the court prove that the latter fulfil all the elements of the criminal offence, but could not be foreseen at the date of criminalisation"[25].

5. Adoption of criminal law according to the Constitution

According to Article 73 of the Constitution: *"Organic laws shall regulate (...):*

h) criminal offences, penalties, and the execution thereof;

i) the granting of amnesty or collective pardon".

According to Article 115 paragraph (4) of the Constitution:

"*(4) The Government can only adopt emergency ordinances in exceptional cases, the regulation of which cannot be postponed, and have the obligation to give the reasons for the emergency status within their contents*".

According to Article 173 of the Criminal code:

"*Criminal law means any criminal stipulation included in organic laws, emergency ordinances or other regulatory acts which, at the date they were adopted, had legal power*".

It follows from the abovementioned legal and constitutional provisions that there are two categories of legal acts by which criminal rules may be prescribed, namely the organic laws and the emergency ordinances.

We conclude that criminal law may only be regulated by organic laws and emergency ordinances.

3. Conclusions

The legality of criminalisation is a fundamental principle of criminal law, intended for the legislator and the judicial bodies, according to which only the acts defined by criminal law at the time when they were committed constitute criminal offences and may be punished by criminal law.

The principle of legality of criminalisation imposes five standards, and in the absence of any of them one cannot speak of legality within the meaning of the principle we are dealing with here. Indeed, a criminal law complies with the principle of legality if it is: written (*lex scripta*); certain (*lex certa*); non-retrospective (*lex pravevia*); strict (*lex stricta*); adopted according to the provisions of the Constitution.

Criminal law may only be regulated by organic laws and emergency ordinances.

[23] Moreover, Article 146 of the 1969 Criminal code was amended several times and every time the scope of acts with "very serious consequences" was narrowed down.

[24] *I.Neagu*, Criminal procedure law. Treatise, Global Lex Publishing House, Bucharest, 2002, p.88-93; *G. Bettiol*, Diritto penale, Cedem Publishing House, Padova, p. 112.

[25] *N. Giurgiu*, Criminal law and criminal offence, Gama Publishing House, Iași, p.82.

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